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No. 99 402

In The

SUPREME COURT OF THE UNITED STATES

FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN & HELPERS LOCAL 287; ED QUINTAL; ED DEBROCK; GEORGE NETTO; LEE SCOGGINS,

Petitioners,

vs.

BILL BROOKE; ROBERT SANDOVAL; ROBERT WILLIAMS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a union is prohibited by Title I of the Labor Management Reporting and Disclosure Act (29 U.S.C. §411 *et seq.*) from disciplining union officials who violate a valid union rule against using union funds for election campaigning where their violation occurs in the context of other conduct they engaged in that is protected by the Act.

2. Whether the evidentiary framework derived from this Court's decision in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) is properly applied to cases arising under Title I of the Labor Management Reporting and Disclosure Act (29 U.S.C. §411, *et seq.*) involving the discipline of union officials who engage in both protected and unprotected conduct within the meaning of the Act.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

All parties to the proceedings below are identified in the caption. Petitioner Freight, Construction, General Drivers, Warehousemen and Helpers, Local 287 is an unincorporated labor organization affiliated with the International Brotherhood of Teamsters, AFL-CIO.

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Petitioners Freight, Construction, General Drivers, Warehousemen & Helpers Local 287 and Ed Quintal, Ed DeBrock, George Netto and Lee Scoggins (hereafter collectively referred to as the "Union"), petition for the issuance of a Writ of Certiorari to review the decision and judgment of the Unites States Court of Appeals for the Ninth Circuit in this proceeding.

OPINIONS BELOW

The Order and Amended Opinion of the Court of Appeals is reported at 175 F.3d 680, 161 L.R.R.M. 2065, (9th Cir. 1999) and is reproduced in Appendix A, *infra.* The District Court's unpublished Memorandum of Decision, denying Defendants' Motion for Judgment as a Matter of Law and granting Defendants' Motion for a New Trial is reproduced in Appendix B, *infra.*. The Decision and Order of the District Court granting in part and denying in part Plaintiffs' Motion for Summary Judgment, and denying Defendant's Cross-Motion for Summary Judgment is reported at 832 F. Supp. 283, (N.D.Cal. 1993) and reproduced in Appendix C, *infra.*

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its original Opinion on April 21, 1999 and its Amended Opinion on June 3, 1999. Petitioners filed a Petition

for Rehearing and Suggestion for Rehearing En Banc which the Court of Appeals denied on June 7, 1999 (App.D, 41a - 42a).[1] The Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254 (1) and 2106.

STATUTORY PROVISIONS

The relevant statutory provisions are Section 101(a)(2), Section 101(a)(4), Section 101(a)(5) and Section 401(g) of the Labor Management Reporting and Disclosure Act ("LMRDA" or the "Act") (29 U.S.C. §§411(a)(2), (4) and (5) and §481(g)). The pertinent text is reproduced in Appendix E, *infra.*

STATEMENT OF THE CASE

This case grows out of internal union disciplinary proceedings involving charges that the plaintiffs impermissibly used union funds to promote their own campaigns for election to union office in 1988.

The District Court had original jurisdiction in this cause pursuant to 28 U.S.C. §§1331 and 1337. The plaintiffs filed the present action in the district court under Sections 101(a)(2), (a)(4) and (a)(5) of the LMRDA, asserting that by

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[1] Citations to "App." are to the appendix to this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14.1.(i).

disciplining them the Union had retaliated against them for exercising their free speech rights, their rights to sue, and their rights to a fair hearing.

Before trial, the District Court granted summary judgment as to the liability issue on the due process count, leaving the question of dar ages on this claim for the jury to decide, but denied summary judgment on the remaining counts. The jury awarded substantial damages to the plaintiffs on all counts. However, the trial judge granted the defense motion for a new trial. In so doing the judge explained that:

> [the] great weight of the evidence favors Defendants' affirmative defense that...plaintiffs would have been disciplined in any event for violating a reasonable rule of the union even if Defendants disciplined them because of a retaliatory motivation" (App.B, at 27a-28a).

The second trial resulted in a verdict for the Union on the §§101(a)(2) and (a)(4) claims and an award of nominal damages to the plaintiffs in the amount of $1.00 against each defendant on he §101(a)(5) count. Plaintiffs appealed and the Court of Appeals reversed the trial judges's new trial order issued at the close of the first trial, reinstated the original verdict and remanded the case to the District Court for consideration of a possible remittitur with respect to some, but not all, of the components of the original damages award.

The salient facts for resolving the issues raised in this Petition are largely undisputed and may be summarized as follows:

A. The Structure and Governance of the Union

Teamsters Local 287 is a local labor organization affiliated with the International Brotherhood of Teamsters ("IBT"). The IBT is organized on a geographic basis into several intermediate bodies known as Joint Councils; these in turn are comprised of the various local unions within the designated geographic jurisdiction of the particular Council. The Union involved in this case is affiliated with Teamsters Joint Council No.7. The Union represents approximately 2800 members working in a variety of occupations and has its principal office in San Jose, California.

The affairs of the Union are governed by its Bylaws and the Constitution of the IBT. Pursuant to these governing documents an elected Executive Board, consisting of seven members, is charged with the overall responsibility of supervising the affairs of the Union between the regularly scheduled general membership meetings. The day-to-day management of the Union is the responsibility of the Secretary-Treasurer, who is the principal officer.

The Union's Executive Board is required by the Bylaws to convene at least on a weekly basis. The Executive Board must transact the business of the Union through the procedure of having motions made, discussed and then voted upon at meetings of the Board. Pursuant to Article XVII,

Section 3 of the Bylaws, a majority vote of the Board taken at its regularly scheduled meetings, where a quorum is present, is deemed to be the official action of the Union. On matters such as extraordinary expenditures of Union funds, requiring action of the Board between its regular meetings, the Bylaws provide for the polling of all members of the Board by "telegram, letter or telephone".

Under the Bylaws, and pursuant to the requirements of the LMRDA, the Union conducts elections of its officers every three years. The present case arises in the context of the 1988 union election. Prior to that election, plaintiffs Brooke, Sandoval, and Williams were members of the Executive Board. Another Board member, Bart Wolin, was politically aligned with the plaintiffs. These four were opponents of the principal officer at the time, Mario Gullo, and the other two members of the Board.

The December 1988 elections resulted in the defeat of Gullo by David Haas[2], but each of the individual defendants, all of whom were Gullo supporters, were elected to a majority of the positions on the new Executive Board. Sandoval was reelected as President of the Board, while Brooke and

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[2] Haas was a plaintiff in the original action, but has since died. The administrator of his estate, Sandy Snyder, was substituted in as a party but that portion of the case has long been settled and is not affected by these proceedings.

Williams won positions as Business Agents[3] but were unsuccessful in their bids for reelection to positions on the Executive Board.

B. The Expenditure Of Union Funds By The Plaintiffs During the Course Of Their Election Campaign.

According to the plaintiffs, during 1988 they became concerned with Secretary-Treasurer Gullo's handling of his financial responsibilities. In particular, they claim to have been disturbed by the apparent lack of adequate records reflecting the receipts and expenditures of "supplemental dues", paid by the Union's members employed in the construction industry in addition to the standard dues required of all members. In addition, plaintiffs were also concerned about Gullo's handling of the Union's Sick and Death Benefit Fund, set up to provide for benefits to members who become sick and to the family of a member who dies.

By September 1988 each of the plaintiffs had decided to run for reelection and began meeting with their supporters, including retired member Frank Martinez. He introduced them to a private attorney, Fernando Hernandez, with whom plaintiffs met at least twice in September 1988 to discuss their

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[3] Business Agents are responsible for the daily representation of the members in collective bargaining related matters but do not serve in a policy making position on the Executive Board.

concerns about Gullo. None of the other Executive Board members were apprised of these meetings.

However, at the meeting of the Board on October 6, 1988, the plaintiffs presented a motion for the Board's approval that the Union hire attorney Hernandez "...for the purpose of investigating the proper application in regards to the supplemental dues being paid by mixer and construction members, and other related matters, as prescribed by our bylaws." Plaintiffs, joined by their supporter Bart Wolin, commanded a majority of the Board and voted to adopt the motion. Immediately following that Board meeting, plaintiffs signed a retainer agreement with Hernandez committing the Union to pay him legal services at the rate of $200.00 an hour, with a non-refundable retainer of $5000.00.

The action of the Executive Board was reported to the membership at the October 15th general membership meeting. The membership adopted a motion directing the Board to rescind its action hiring Hernandez as attorney for the Union. The plaintiffs ignored the memberships' directive, and instead continued to employ his services, the cost of which ultimately exceeded $13,000.00.

During the 1988 election campaign season, at the direction of the plaintiffs, Hernandez performed a variety of services purportedly in the name of the Union -- all of which involved issues exploited by the plaintiffs in their campaigns. Hernandez did so with the understanding that his fees would be paid for exclusively out of the Union's funds. In particular, plaintiffs had him do the following legal work:

1. Immediately after the October 6th Board meeting was adjourned, plaintiffs met among themselves and decided to have Hernandez obtain a copy of an earlier confidential settlement agreement between the Union and the Equal Employment Opportunity Commission disposing of a race discrimination lawsuit brought on behalf of a former clerical employee of the Union, Syble Coleman. The plaintiffs themselves had voted as members of the Executive Board to approve that settlement at an earlier Board meeting and knew that its terms were to be confidential.

Despite the fact that no mention of this issue had been made to the Board at its October 6 meeting, and thus no motion had been brought to the Board to authorize the expenditure of funds for this purpose, the next day Sandoval telephoned Hernandez and instructed him to obtain the settlement document. The attorney contacted the Regional Office of the EEOC and, holding himself out as the Union's attorney, obtained a copy of the agreement. The copy was then passed on to the plaintiffs. Ignoring the mutual non-disclosure requirement, the financial terms of the settlement were thereafter publicized during the course of the election campaign. A recurring theme of the plaintiffs' campaign literature was the charge that Gullo had discriminated against Syble Coleman.

2. In November 1988, shortly before the December election, plaintiffs directed the attorney to file a lawsuit against Gullo. The suit alleged that Gullo had breached his fiduciary

duty by failing to provide an accounting, that he had embezzled Union funds, and that he was attempting to amend the Union bylaws without following proper procedures so as to provide for the appointment rather than the election of Union stewards. The suit named the Union as plaintiff and was soon amended to name as co-defendants other candidates who supported Gullo in the forthcoming election, but who were not in any way involved at the time with the administration of Union funds.

Sandoval admitted at trial that before a lawsuit may be filed on behalf of the Union "...that's a matter that the Executive Board would, under the bylaws, discuss as a body..." (RT.Vol.V, p.67)[4] Despite this requirement, the plaintiffs did not seek nor obtain the authorization of the full Executive Board either to file the original suit or to amend it to name additional defendants.(*Id.*,pp.64-66). Instead, they made the decision to file the lawsuit in secret and without informing any other member of the Executive Board.

The fact of the filing of the lawsuit against Gullo and the other candidates who were running with him was featured extensively in the plaintiffs' election campaigns. So too, the allegations of misconduct contained in the Complaint became the cornerstone of their campaign platform.

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[4] The citation "RT" refers to the reporter's trial transcript.

3. Plaintiffs also used Hernandez to intercede with an employer, Fleming Foods, concerning a problem the plaintiffs had in gaining access to that employer's facilities to campaign among the Union members working there. More specifically, the plaintiffs believed they were being denied equal access to the premises and that their campaign literature was being improperly removed from the employee bulletin boards in the facility. At their direction, the attorney contacted Fleming Foods both by telephone and by letter. In the correspondence sent on the plaintiffs' behalf, Hernandez protested the apparent denial of access and threatened to bring suit against the company.

4. Finally, the attorney met on several occasions with plaintiffs' supporters, as well as other candidates on their slate. After the election was completed Hernandez spent at least 3 ½ hours with Sandoval, Brooke and another candidate, Greg Guevara, to review the election results and related matters.

Hernandez testified that he had not been separately retained by any of the plaintiffs to provide individual representation in connection with any of the foregoing services but was instructed to bill the Union for all his fees and costs.

C. The Post-Election Proceedings Against the Plaintiffs.

1. The unsuccessful candidates in the 1988 elections from both slates filed protests to the election results. In accordance with the IBT Constitution such protests were

initially presented to Joint Council No. 7 for determination. After conducting a hearing, insofar as is relevant to the instant proceedings, the Joint Council ruled that the election for the positions which the plaintiffs won should be vacated and a new election conducted.

In its written decision directing a new election the Joint Council explained that the plaintiffs had "...improperly used their official positions with Local 287, and the funds or credit of Local 287 to support their campaign and the campaigns of other candidates they supported...", and that the expenditure of the Union's funds to hire Hernandez to file the lawsuit as well as to perform services in connection with the Syble Coleman and the Fleming Foods matters had not been authorized by the Executive Board.

The plaintiffs appealed the Joint Council's decision to vacate the election results to the IBT, which affirmed that decision. A complaint was then made to the United States Department of Labor, pursuant to its authority under Title IV of the LMRDA (29 U.S.C. §§ 481-483) to investigate complaints concerning the conduct of union elections. In declining to overturn the IBT's affirmance of the decision to rerun the election, the Department of Labor noted that the use of Union funds to pay for attorney Hernandez arguably "...constitute[d] a Section 401(g) violation."[5] In its Statement

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[5] Section 401(g) of the Act forbids the use of any Union funds to "promote the candidacy of any person in any election subject to the provisions of [the Act]."(App.E,at 44a).

of Reasons, the D.O.L. explained that "...the International's decision to affirm the [Joint Council's] decision to rerun the election was reasonable and consistent with the intent of the Act in that the investigation revealed that violations of the Act occurred during the December 12, 1988 election."[6] The rerun election was conducted by secret ballot in September 1989; this time the membership voted each of the plaintiffs out of office.

2. In addition to challenging the election, Gullo filed charges against the plaintiffs under the Union Bylaws. The charges accused the plaintiffs, *inter alia,* of exceeding their authority under the October 6 Executive Board motion by filing the lawsuit "...without Executive Board approval" and in other ways of "... the misuse of the powers of their office". In August 1989 the individual defendants, who by then constituted a majority of the newly elected Executive Board, convened a hearing on the charges. Although given notice of the hearing none of the plaintiffs appeared.

The hearing tribunal found each plaintiff guilty as charged. At the trial in the instant action defendant Quintal testified without contradiction that the tribunal reached its decision based on a combination of factors. In particular, he

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[6] The full text of the D.O.L.'s decision was not received into evidence in the first trial, but its content was referred to by witnesses from both sides during their testimony.

explained that evidence was presented establishing that the plaintiffs had used Hernandez to obtain the Syble Coleman settlement documents, to intercede on their behalf with Fleming Foods, and to file the lawsuit on behalf of the Union shortly before the election against Gullo and others, all of which the panel believed exceeded the scope of the October 6th motion authorizing the employment of Hernandez. (RT. Vol.X, pp.78-80).

Plaintiffs appealed the discipline to the Joint Council largely on procedural grounds but did not contest the essential facts upon which the Union had rested its decision. The Joint Council affirmed the discipline. In the interim, this action was instituted in the District Court.

D. The Proceedings Below

1. Prior to trial the parties submitted cross-motions for summary judgment. The District Court ruled in favor of the plaintiffs on the §101(a)(5) due process claim, holding that the composition of the Union's hearing panel was biased as a matter of law because its members were political opponents of the plaintiffs. Thus, the only issue left for trial on this count was the question of damages for the due process violation.

The District Court denied plaintiffs summary judgment on the right to sue claim because it found there were disputed material facts. The Court explained its decision as follows:

> It has not yet been determined whether or not the plaintiffs were disciplined because they initiated the lawsuit or because they went beyond the boundaries of the Executive Board's resolution in investigating Gullo. If the discipline stemmed from misuse of the attorney's time, it would not be related to individual rights but proper union management and use of union finances. (App.C, at 39a).

The District Court thus recognized the important distinction between the disciplining of union officials solely because they filed a lawsuit against another official on the one hand, and on the other hand disciplining the officials for the misuse of union funds to promote their personal election campaigns, even if one device for doing so was the filing of a lawsuit, where such expenditure has not been duly authorized. In this posture the case proceeded to trial.

2. Upon the conclusion of the presentation of the evidence, the trial judge instructed the jury, without objection from either side, that to establish a violation of §§101 (a)(2) and (a)(4) the plaintiffs had to prove by a preponderance of the evidence that: "... the defendants' decision to discipline plaintiff was made in significant part because of his exercise of these protected rights".(App.F, at 45a). The judge then instructed the jury as to the defendants' affirmative defense in the following terms:

> If you find that plaintiffs have established each of the elements necessary to make out a prima facie case of retaliation for their exercise of legally protected rights, then defendants may rebut that inference by proving by a preponderance of the evidence that the plaintiffs would have been disciplined for violating a reasonable rule of the Union even if defendants had not been motivated by an improper purpose. And that's for the defense to prove. Therefore, if you find by a preponderance of the evidence that there was reasonable standard for the discipline of plaintiffs under the circumstances of this case, your verdict must be for the defendants... (App.F,at 45a-46a).

The jury returned a verdict in the plaintiffs' favor on all counts and awarded them damages totaling in excess of $1.3 million. Pursuant to Rules 50(b) and 59(a) defendants moved for judgment as a matter of law or in the alternative for a new trial. The trial judge granted the motion for a new trial and vacated the jury verdict in its entirety as to the plaintiffs herein. The judge concluded that the "great weight" of the evidence supported the affirmative defense set forth in the jury instruction. The second trial produced a defense verdict on the §§ 101(a)(2) and (a)(4) counts. Plaintiffs appealed from the judgment in the second trial and from the Order granting a new trial following the verdict in the first trial.

3. The Court of Appeals reversed the trial judge's new trial order. In an opinion authored by Judge Reinhardt, the Court of Appeals described the issue in this case as simply whether "...the plaintiffs had legitimate grounds to cause the hiring of Hernandez and the institution of the action" (App.A, at 16a). The Court further reasoned that only if "the plaintiffs had no legitimate basis for their actions, the discipline imposed upon them may have been lawful." (*id.*).

From this premise, the Court proceeded to analyze the record to determine whether the jury could have concluded that there was a reasonable basis for the plaintiffs to be concerned over Gullo's handling of the Union's Sick and Death Benefit Fund and the Supplemental Dues program. The Court concluded they had "valid cause to believe that Gullo was mishandling union funds." (*Id.* at 18a). According to the Court, this conclusion was dispositive of the case, irrespective of whether plaintiffs had also engaged in conduct that was unprotected by Section 101(a) of the LMRDA for which they could have been lawfully disciplined.

The Court expressly disapproved the jury instruction that permitted defendants to prove, as an affirmative defense, that plaintiffs were subject to discipline for violating a reasonable rule of the Union, even if they were disciplined in part for protected conduct; an instruction the Court believed would only be appropriate in a case involving "mixed-motives" but inapplicable in the present setting.

The Court also declined to scrutinize the discrete components of the services performed by Hernandez for the plaintiffs to determine whether each was properly authorized by the Union or otherwise protected by the LMRDA. In a brief but revealing footnote, the Court dismissed the necessity for such an inquiry:

> That Hernandez performed several other tasks at the Board's request, such as procuring a copy of the Syble Coleman racial-discrimination settlement and informing Fleming Foods about the requirements of federal labor law, in no way alters our analysis. (App.A, at 15a, n.8).

Instead of remanding the case for a new trial on the theory of liability which the Court of Appeals determined was the correct one, it reinstated the original verdict. The opinion explains that under the jury instruction actually given, the jury necessarily found that "...the hiring of Hernandez and the institution of the action were undertaken in the interests of the union and not 'in support of the [plaintiffs'] candidacy' for union office." (*Id.* at 21a).

REASONS FOR GRANTING THE WRIT

As explained by this Court in *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982), the scope of the protection afforded union members by Section 101(a)(2) of the LMRDA and the scope of a union's authority to enforce its rules concerning the obligations of members to their unions are to be measured by taking into account the competing policy considerations those provisions embody. The demarcation line to be drawn is determined by balancing these equally important considerations. It is scarcely surprising, as is the case here, that the activities of members who oppose a union's incumbent administration may be an admixture of both protected activity and activity that may properly be subject to union discipline. (See also the decisions in this area of the law cited *infra.*, at pages 27-28). Although the factual determinations that courts make in these cases may not be of sufficient importance for review by this Court, the analytical framework within which such decisions are reached presents a substantial and important question in the administration of the LMRDA. The present Petition presents this question.

The Court of Appeals in this case has adopted an approach that shields a union member who engages in a combination of protected and unprotected conduct from any discipline for that part of the conduct that clearly violates a reasonable union rule within the meaning of the proviso to §101(a)(2). As we show below, the problem addressed by the Ninth Circuit's opinion is recurring, and one with respect to

which there is inconsistency and conflict among the courts of appeals.

In short, the Petition presents a question of substantial importance, and one in which uniformity of decision among the lower courts does not presently exist. It should be addressed therefore by this Court.

I.

THE PETITION SHOULD BE GRANTED IN ORDER TO AFFIRM THAT THE TWO-PART TEST SET FORTH IN *MT.HEALTHY* IS PROPERLY APPLIED TO LMRDA TITLE I CASES.

a. Initially, it is important to point out that the undisputed facts in this case squarely present the issue discussed above. Thus, as summarized in the Statement of the Case, the plaintiffs committed Union funds for both permissible and impermissible purposes.

The Union Bylaws set forth in detail the proper allocation of authority and responsibility among the seven-member Executive Board. An important check on the powers of the individual officers is the express requirement, specified in Article XVII, Sections 3 and 5, that the business of the Union, including authorization of expenditure of Union funds, is to be transacted only at the regularly scheduled weekly meetings of the Board or, if necessary between Board meetings, by polling all members. In addition, Article XVII, Section 1.a. of the Bylaws further limits the Board's authority

to transacting the Union's business "...between membership meetings...". Thus, the Union Bylaws prohibit any particular faction of the Board, whether comprising a majority or not, from using the funds of the Union or from undertaking any other action on behalf of the Union without first obtaining proper authorization from the Board through the above procedures; irrespective of whether the proposed action would be completely justified.

With respect to the plaintiffs' initial hiring of Hernandez to investigate "supplemental dues" and "related matters", we can agree that they obtained proper authorization by the approval of the enabling motion presented to the Executive Board at its October 6 meeting. Accordingly, the expenditure of funds for that limited purpose was permissible. But thereafter the undisputed facts establish that there was no authorization for plaintiffs to use Union funds for any other purpose; indeed at the subsequent general membership meeting the Executive Board was directed by the membership to rescind the October 6 motion. The plaintiffs blithely ignored this directive of the membership and continued to use the Union's funds to pay for Hernandez' services. Thus, plaintiffs were not authorized to obtain the confidential settlement agreement in the Syble Coleman matter, nor to have Hernandez intercede in their behalf concerning campaign access with Fleming Foods. As to the filing of the lawsuit against Gullo, it is not necessary to disagree with the Ninth Circuit's conclusion that there was good cause for the plaintiffs to sue him, but the critical point is that they used

Union funds for this purpose without seeking or obtaining proper authorization as required by the governing Bylaws[7].

From the foregoing discussion, it is plain enough that the plaintiffs used Union funds without authorization for a variety of services performed by Hernandez to promote their election campaigns. By so doing, and as found by the Union hearing panel (*supra.*, at p.13), they violated the Union's reasonable rules. Certainly, there was ample evidence presented at trial to warrant the District Court's acceptance of the parties' characterization of this case as involving both protected and unprotected grounds for the discipline.

But, by framing the issue simply as whether "...the plaintiffs had legitimate grounds to cause the hiring of Hernandez and the institution of the action..." against Gullo (App.A, at 16a), the Ninth Circuit erroneously glosses over these critical facts. Consequently, the Court of Appeals does not consider whether the unprotected aspects of the plaintiffs' conduct, standing alone, properly subjected them to discipline under the Union's rules. In fact, the Court expressly declines to do so. (*Id.*, at 15a, n.8). By failing to distinguish

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[7] It is worth noting, insofar as the §101(a)(4) count is concerned, that unlike the ordinary "right to sue" case, here the Union did not discipline the plaintiffs simply because, in their capacity as members, they brought suit against the Union's principal officer using their own funds--- conduct we concede would have been protected by that provision--- but because they caused Union funds to be used for that purpose without proper authorization.

between the different elements of the plaintiffs' conduct, as we show next, the Court below departs from the principles set forth in this Court's opinion in *Sadlowski* and in other prior decisions issued in conceptually similar settings.

b. As pointed out by this Court, LMRDA §§ 101(a)(2) and (a)(4) protect the rights of union members to speak freely and to sue. These rights, however, are not absolute. The proviso to §101(a)(2) expressly reserves to unions the right to "... adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." 29 U.S.C. §411(a)(2). In *Sadlowski*, this Court was called upon to review under this provision a union rule which forbad candidates for union office from using funds contributed to their campaigns by nonmembers. The Court determined that such a restriction on outsider contributions in union elections was rational and thus within the proviso to §101(a)(2), even though it impinged upon the candidates' free speech rights.

In reaching that conclusion, the Court specified the proper analytical framework to determine whether §101(a)(2) has been violated. First, it must be determined whether the rule interferes with an interest protected by the first part of §101(a)(2). If it does, then the second part of the analysis is to determine ".. whether the rule is 'reasonable' and thus sheltered by the proviso..."(*ibid.*). The Court explained that:

> [t]he critical question is whether a rule that partially interferes with a protected interest is nevertheless reasonably related to the protection of the organization as an institution." (*Id.* at 111-112).

The principles derived from *Sadlowski* surely apply with equal force to cases, such as the present, concerning the validity of a union's enforcement of its reasonable rules as well as the determination in the first instance as to whether the union's adoption of the rule is within its authority under the proviso to §101(a)(2).[8]

It is clear from this Court's reasoning in *Sadlowski* that merely because the trier-of-fact concludes that the enforcement of a particular union rule interferes to some extent with rights protected by Title I, that cannot be the end of the inquiry. Rather, the analysis must then shift to a

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[8] The Union's rule, expressly incorporating the prohibitions against the expenditure of union funds for campaign purposes contained in §401(g), (29 U.S.C.§481(g)), was specifically announced to all candidates before the 1988 election. In addition, the Bylaws contain several provisions that either expressly or by necessary implication forbid the expenditure of union funds to further personal political aspirations. Indeed, it was conceded by the plaintiffs at trial that a violation of these rules was considered a serious offense, subjecting the violator to discipline. (R.T.Vol.IV, p.225).

determination of whether the enforcement of the particular rule serves a legitimate interest of the union and is thus sheltered by the proviso. Put another way, if the particular rule is reasonable within the meaning of the proviso, then conduct which is violative of the rule is unprotected and may be made the subject of union discipline.

c. In several other prior decisions, arising in similar contexts as here, the Court has considered what form of analysis should be used by the courts where the conduct at issue involves activity that is in part protected and in part unprotected. These precedents strongly support the jury instruction that the District Court gave in the case at bar.

In *Mt.Healthy City School Dist.Bd. of Educ., v. Doyle,* 429 U.S. 274 (1977), a case where the plaintiff's activities were subject to the more stringent protections afforded by the First Amendment, this Court held that because plaintiff also engaged in conduct that was not constitutionally protected the employer should have had the opportunity to prove, by a preponderance of the evidence, that apart from the protected aspects of his activity there was a permissible basis for its decision not to rehire him.

To aid the trier-of-fact in balancing the competing considerations involved in such cases, the *Mt. Healthy* Court adopted a burden shifting approach, under which the plaintiff first has to establish that protected conduct is a "substantial factor" in the decision. If this is proven, then the trier-of-fact must then determine whether the adverse decision would have

been reached in any event because of the plaintiff's unprotected conduct. (*Id.*,at 429 U.S. 287). The Court explained the rationale underlying this framework as follows:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. (*Id.*at 429 U.S. 285).

The *Mt Healthy* formulation was applied in *Price Waterhouse v. Hopkins*, 490 U.S. 228, (1989) to a similar setting under Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. §§ 2000e *et seq.*).

Likewise, in *NLRB v. Transportation Management Corp*. 462 U.S. 393 (1983) the Court approved the application of the same evidentiary regime in the context of the discharge of a worker in part because of his union activities, protected by the unfair labor practice provisions of the National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq*.. In so doing, the Court upheld the NLRB's approach -- expressly borrowed from *Mt Healthy* -- which allows the employer to avoid liability "... by proving that the discharge rested on the employee's unprotected conduct as well and that the employee would have lost his job in any event." *Transportation Management, supra*., at 462 U.S. 400.

The common thread that runs through the foregoing decisions is the recognition by this Court, in a variety of settings analogous to the present context, that a plaintiff who engages in activity containing both protected and unprotected elements, and shows the protected conduct played a substantial part in the adverse decision, is not automatically immune from adverse consequences for that part of the conduct which is not protected. There is no principled reason not to apply the same mode of analysis to union discipline cases arising under the LMRDA which similarly involve both protected and unprotected conduct on the part of the disciplined member.

II.
THE NINTH CIRCUIT'S DECISION ADDS TO THE CONFLICT AMONG THE CIRCUITS WITH RESPECT TO THE PROPER STANDARD FOR DETERMINING WHETHER UNION DISCIPLINE IS VALID UNDER LMRDA TITLE I.

In the present case, the jury instruction was expressly fashioned to specify the test for liability outlined in *Mt.Healthy* and *Black v. Ryder/P.I.E. Nationwide*, 970 F.2d 1199 (6th Cir. 1979) , a case in which the Sixth Circuit expressly analogized the problem presented in the LMRDA context to that confronted by this Court in *Mt Healthy*.

In *Black* , as here, the plaintiff asserted that he had been disciplined by the union for his political opposition to the incumbent union leadership and in particular for organizing a picket line outside the union offices, activity protected by Title I. The defendant union argued that he had been disciplined for the violent and disruptive conduct which occurred on the picket line, conduct unprotected by the Act. On appeal from a verdict against the union, the Sixth Circuit found that the jury had been correctly instructed.

The Sixth Circuit thus expressly approved a two part test for evaluating Title I claims in all material respects identical to the approach adopted by the District Court in this case. According to the standard approved by the Sixth Circuit, once the plaintiff in a Title I case has "...proven that his exercise of protected speech played a substantial role in the actions taken against him, the burden then shift[s] to the

defendants to prove that their actions were a result of the adoption and enforcement of reasonable rules regarding the responsibilities of every member toward the union."(*ibid).* Accord, *Kuebbler v. Cleveland Lithographers & Photoengravers Union Local 24-P,* 473 F.2d 359 (6th Cir. 1973); see also, *Aircraft Mechanics v. Transport Workers Union of America* , 98 F.3d. 597 (10th Cir. 1996), (applying a two-step analysis to the discipline of union members who advocate dual unionism, and holding that such discipline is permissible under the proviso to §101(a)(2), even though it also involves elements of free speech).

By reversing the District Court's determination that the test applied in *Black v. Ryder* was applicable to the facts in the present case, the Ninth Circuit parts company with the Sixth and Tenth Circuits, as well as its own prior decisions. See e.g., *Fergusson v. Ironworkers*, 854 F.2d 1169 (9th Cir. 1988) and *Massey v. Inland Boatmen's Union*, 886 Fd 1188 (9th Cir.1989).[9] Indeed, the Court seems to suggest that the

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[9] In *Fergusson*, a case not discussed in the decision below, a different panel of the Ninth Circuit did apply a balancing test to determine whether the union there properly disciplined its member. The *Fergusson* court held, contrary to the Ninth Circuit in the instant case, that a member is not immune from discipline simply because the particular conduct may be in part protected, supra., at 854 F.2d 1174. In *Massey* another panel of the Ninth Circuit expressly adopted a burden shifting regime, identical to the *Mt. Healthy* formulation, to determine violations of Title I.

plaintiffs were entitled to a verdict in their favor " if they had *a* legitimate basis for their actions..." (App.A, at 21a; emphasis supplied). The Court has now aligned itself with those Circuits which have held that it is enough for a Title I plaintiff to prove that protected speech was one of the reasons for the discipline, even if the union can prove that there was an independent basis for discipline. See, *Petramale v. Laborers Local 17,* 736 F.2d 13 (2nd. Cir. 1984) cert., denied, 469 U.S. 1087 (1984); *Bradford v. Textile Workers Local 1093,* 563 F.2d 1138, 1143, (4th Cir.1977).

In disapproving the jury instruction, the Court of Appeals explained that the affirmative defense, borrowed from *Mt. Healthy* and *Black v. Ryder,* is not available to the Union here because: "[t]his case does not present a dispute as to what motivated the defendants to discipline the plaintiffs."

It is not necessary to disagree with the Ninth Circuit's view that this case does not involve the "mixed-motives"of the defendants.[10] However that may be, the decisive point is that it certainly presents an admixture of conduct, a part of which is protected by the first clause of §101(a)(2), and a part which plainly violated the Union's rule against the unauthorized use of union funds for campaign purposes, a rule

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[10]Nonetheless it is worth pointing out that from the inception of this case the plaintiffs considered this a "dual motives" case. It is therefore not surprising that the District Court adopted that terminology as well.

easily supportable under the proviso.

In this circumstance, the District Court properly looked to *Mt. Healthy* for an analytical framework that conveys the principle embodied in Title I that a union member ought not to escape the disciplinary consequences of violating the union's reasonable rules, simply because that violation occurs in the context of other activity that may be protected. The contrary holding of the Ninth Circuit in the present case, and the approach of the Second and Fourth Circuits in similar cases, is fundamentally at odds with this Court's prior rulings and is incompatible with the strong command of the proviso to §101(a)(2) that nothing is to impair the union's right to enforce its reasonable rules.

CONCLUSION

For all the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED APRIL 21, 1999 AND AMENDED JUNE 3, 1999

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SANDY SNYDER, ADMINISTRATOR OF THE ESTATE OF DAVID HAAS,
Plaintiff,

and

BILL BROOKE; ROBERT SANDOVAL; and ROBERT WILLIAMS,
Plaintiffs-Appellants-Cross-Appellees,

v.

FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 287; ED QUINTAL; ED DE BROCK; GEORGE NETTO; and LEE SCOGGINS,
Defendants-Appellees-Cross-Appellants.

Nos. 96-15267
96-15274

D.C. No.
CV-89-20531-WAI

ORDER AND
AMENDED
OPINION

Appeals from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding

Argued and Submitted
July 13, 1998—San Francisco, California

Filed April 21, 1999
Amended June 3, 1999

Before: Stephen Reinhardt, John T. Noonan, and David R. Thompson, Circuit Judges.

Opinion by Judge Reinhardt

Appendix A

SUMMARY

Labor and Employment/Unions

The court of appeals affirmed an order of the district court in part and reversed in part. The court held that under the Labor Management Reporting and Disclosure Act (LMRDA), members of a union's executive board may use union funds to retain counsel and institute an action against a union official who has violated his statutory fiduciary duties.

Prior to the 1988 elections, appellants Bill Brooke, Robert Sandoval, and Robert Williams were members of the Executive Board of appellee Freight, Construction, General Drivers, Warehousemen and Helpers, Local No. 287. During 1988, these Board members came to believe that Mario Gullo, the local's chief executive officer and secretary-treasurer, was mishandling union funds for his own benefit. Because of an absence of accounting records, they were particularly concerned about supplemental dues and the Sick and Death Benefit Fund.

In 1987, the union had increased the share of monthly dues payments allocated to the Sick and Death Benefit Fund. However, there was no corresponding increase in the Fund's value. When the Executive Board members confronted Gullo about the discrepancy, they did not receive an explanation that satisfied them. They consulted with attorney Fernando Hernandez and passed a motion authorizing the union to retain him to conduct an investigation.

When Gullo continued to refuse to provide information regarding financial matters to the Executive Board, Hernandez filed an action against him on behalf of the individual Board members and the union. The complaint alleged that Gullo failed to provide an accounting of funds in his possession in violation of the union's bylaws, and had diverted

union funds to his own use. (The cited bylaws gave the Board authority to retain attorneys to institute legal proceedings if it determined that such action was necessary to "protect, preserve, or advance the interests of the organization.") The plaintiffs requested an accounting and damages equal to the amount of the misappropriated funds. A short time later, Gullo purportedly "found" $11,748 in his safe and presented Sandoval with a check in that amount.

In the 1988 elections, David Haas defeated Gullo in the campaign for secretary-treasurer, the union's top post. However, Gullo's supporters were elected to a majority of the positions on the Executive Board. The new Board fired Hernandez. Gullo filed internal charges against Brooke and the other plaintiffs, alleging that the lawsuit and related expenditure of union funds were politically motivated and intended to harm Gullo, and defrauded the union of $13,000. Pursuant to his authority as secretary-treasurer, Haas cancelled the scheduled hearing on the charges, and none of the plaintiffs attended.

A panel of the Local consisting of the Gullo supporters on the Executive Board and others chosen by them conducted a trial at the scheduled time. The result was that each plaintiff was removed from office, fined, and ordered to reimburse the union for costs incurred by Hernandez. Based primarily on the record of the trial, the Teamsters Joint Council upheld the action except as to Haas, but reduced the amount of the fines.

Brooke and the other plaintiffs filed another action, contending that the assessment of fines against them and their removal from office constituted discipline in violation of the LMRDA; that the discipline was invalid because it was imposed in retaliation for the plaintiffs' filing of a legitimate lawsuit, in violation of § 101(a)(2) and (4) of the statute; and that the hearings violated the plaintiffs' right to due process in union disciplinary proceedings in violation of § 101(a)(5).

Appendix A

The district court granted summary judgment for the plaintiffs as to liability on the § 101(a)(5) claim, ruling that the original hearing denied the plaintiffs the process they were due under the LMRDA, and that the Joint Council proceedings failed to cure the procedural defects. The court also determined that the first trial was biased in that the plaintiffs' political opponents actively participated in it, and that the second trial before the Joint Council was biased as a matter of law due to the Council's reliance on the records of the first proceeding. The case proceeded to trial on all other issues.

The district court and the parties characterized the action as a "mixed motives" case; the court instructed the jury accordingly. The jury returned a verdict in the plaintiffs' favor, awarding substantial compensatory and punitive damages. However, the court granted a defense motion for a new trial as to Brooke, Sandoval, and Williams on the § 101(a)(5) claims, based on its understanding that liability was to be assessed according to a mixed-motives regime, and that the defendants had established the affirmative defense that the plaintiffs would have been disciplined in any event for violating a reasonable union rule.

In the second trial, the district court again instructed the jury as if the case were a mixed-motives action. This time, the jury returned a verdict for the defendants on the free speech and right-to-sue claims. As to damages for the procedural due process violation, the jury awarded each plaintiff five dollars.

On appeal, the plaintiffs contended that the district court erred in granting the defendants a new trial. The defendants cross-appealed, asserting that the district court erred in granting summary judgment for the plaintiffs on their due-process claim, and that the damages were excessive.

[1] The parties and the district court confused the issue by characterizing the litigation as a mixed-motives case. The order setting aside the verdict and directing a new trial was

based on the court's understanding that the union had made out an affirmative defense available under a mixed-motives approach. A mixed-motives case calls on the court to determine what motive or motives led the defendant to take a disputed disciplinary action.

[2] This case did not present a dispute as to what motivated the defendants to discipline the plaintiffs. The parties agreed that the defendants disciplined the plaintiffs because the plaintiffs caused the Executive Board to retain Hernandez to institute the action against Gullo, and to obligate union funds in the process. If that conduct was protected by the LMRDA, the defendants' motives were irrelevant, at least as to liability. The dispositive point was that the conduct for which the plaintiffs were disciplined *was* lawful, and could *not* constitute the basis for discipline under the LMRDA. The court was therefore not called on to determine what motivated the defendants to act. The district court's new trial order was based on an erroneous legal theory.

[3] The question presented by this case was whether there was a legitimate basis for the *plaintiffs*' actions: whether there was a legitimate reason for the three members of the Executive Board to cause the union to hire Hernandez and to have him file the action against Gullo, with the concomitant expenditure of union funds.

[4] Section 501(a) of the LMRDA describes the fiduciary responsibilities of officers of labor organizations. Officials such as Gullo occupy positions of trust, and must hold the union's money or property solely for the benefit of the organization and its members. Implicit in the grant to union members of the right to sue, when the governing board of the union fails to do so, is an obligation on the part of the executive board to bring an action or seek appropriate relief on behalf of the union against an officer when the board becomes aware that the officer has violated his § 501(a) duties. In bringing such an action, the board may use union funds.

[5] The plaintiffs had valid cause to believe that Gullo was mishandling union funds. [6] The evidence supported the determination that at the time the plaintiffs hired Hernandez and caused the action to be brought against Gullo, they had valid cause to believe that Gullo was violating his § 501(a) duty to hold the union's money solely for the benefit of the organization. The plaintiffs' actions were therefore appropriate and consistent with their legal obligations, and a jury finding to that effect was not subject to reversal by the district court. [7] This conclusion was confirmed by the union's bylaws.

[8] An action instituted to ensure that the union's secretary-treasurer is properly handling union funds is one designed to protect the interests of the union. [9] It was irrelevant that the plaintiffs referred to the lawsuit against Gullo in the subsequent election campaign, or that they may have benefited politically from it. It was also irrelevant that the plaintiffs may have been motivated by political considerations when they brought the action. When an action is brought to recover unlawfully expended union funds, or to obtain a statutorily required accounting, a reasonable basis for the action is sufficient to preclude discipline.

[10] Under the instructions given by the district court, in order to find for the plaintiffs the jury was required to determine that they were engaged in protected conduct, i.e., that they hired Hernandez and instituted the action against Gullo in order to safeguard union assets. On the other hand, the jury was to find for the defendants if it determined that the plaintiffs used union funds to hire Hernandez and pursue the action in support of their candidacy for union office. In returning a verdict in favor of the plaintiffs, the jury necessarily concluded that the hiring of Hernandez and the institution of the action were undertaken in the interests of the union, and not in support of the plaintiffs' candidacy. [11] The plaintiffs were therefore entitled to reinstatement of the original verdict.

[12] When an award of damages is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork, and gives rise to an inference that passion and prejudice tainted the jury's finding of liability, a new trial may be in order. However, when there is no evidence that passion and prejudice affected the liability finding, remittitur is an appropriate method of reducing an excessive verdict. There was no evidence that the liability determination was tainted by passion or prejudice. On remand, the district court could consider a remittitur on damages, but could not order a new trial.

[13] A trial de novo is required to remedy a union disciplinary hearing that does not meet the due-process standards of § 101(a)(5). A mere review of the evidence or results of the previous hearing is not sufficient to constitute such a trial. The evidence presented to the Joint Council consisted almost entirely of the transcript of the first hearing (conducted by the biased Local 287 panel). The second hearing did not constitute a trial de novo, and failed to cure the procedural defects of the first. The district court's summary judgment as to the plaintiffs' § 101(a)(5) claim therefore had to be affirmed.

COUNSEL

Christopher W. Katzenbach, Katzenbach and Khtikian, San Francisco California, for the plaintiffs-appellants-cross-appellees.

Kenneth C. Absalom, Beeson, Tayer & Bodine, San Francisco, California, for the defendants-appellees-cross-appellants.

ORDER

The opinion filed April 21, 1999 is amended as follows:

Appendix A

At Slip Op. 3689, following the last sentence of the runover paragraph, the following is added:

> Interest on the damages ultimately awarded by the district court shall be paid from the date of the original judgment, October 18, 1994. *See, e.g., American Telephone & Telegraph Co. v. United Computer Systems, Inc.*, 98 F.3d 1206, 1209 (9th Cir. 1996)(*citing Northrup Corp. v. Triad Int'l Marketing, S.A.*, 842 F.2d 1154, 1156 (9th Cir. 1988)). That judgment was legally sufficient to allow adequate "ascertainment of the damage[s]," subject, of course, to the remittitur ordered herein. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990).

OPINION

REINHARDT, Circuit Judge:

This case arises out of a bitter internal dispute involving charges of misuse of union funds. The struggle, which occurred twelve years ago, also involved a fight for control of leadership of the local union. At one point, shortly preceding a local union election, the plaintiffs took their charges of financial misconduct to federal court but were quickly disciplined by the union for using union funds to do so. The plaintiffs then filed the present action in the district court under §§ 101(a)(2), (a)(4), and (a)(5) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 411(a)(2)-(5). They asserted a violation of their free speech rights, their rights to sue, and their right to a fair union hearing, and sought damages on account of the "unlawful" disciplinary action. The plaintiffs won a substantial judgment from a jury on all counts, but lost that victory when the district judge ordered a new trial. The plaintiffs had succeeded earlier in the proceeding, however, in establishing a violation of their pro-

cedural rights to a fair union trial under § 101(a)(5). Accordingly, as to that claim, the jury was required to determine only the amount of the damages and the district judge limited the new trial order on that count to damages only. The plaintiffs appeal the new trial order in its entirety, while the defendants cross-appeal the earlier ruling of liability on the procedural claim. We uphold plaintiffs' appeal and reinstate the jury verdict; we also reject the defendant's cross-appeal.

I.

Background

Prior to the 1988 union elections, plaintiffs Bill Brooke, Robert Sandoval and Robert Williams were members of the Executive Board of Teamsters Local 287. Brooke was also vice-president, Sandoval was president, and Williams was a Trustee. During 1988, the plaintiffs and Dave Haas[1] came to believe that Mario Gullo, the local's chief executive officer, its secretary-treasurer, was mishandling several of his financial responsibilities. In particular, due to the apparent absence of records that reflected the actual receipt and expenditure of "supplemental dues," the plaintiffs were concerned about how Gullo was handling that segment of the union's funds. For other reasons, they were also concerned about his handling of the Sick & Death Benefit Fund. Supplemental dues are paid by certain union members in addition to the standard dues that all members pay. The Sick & Death Benefit Fund, financed through regular dues, provides benefits to a union member who becomes disabled, or to the family of a member who dies.

In 1987, the union increased the share of the monthly dues payments allocated to the Sick and Death Benefit Fund. In early 1988, Sandoval became concerned that despite this

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[1]Haas, another member of the Executive Board and a business agent, was a plaintiff in the original action, but has since died.

increase, there was no corresponding increase in the Fund's total value. The plaintiffs approached Gullo about the discrepancy between the increased allotment for the fund and the Fund's actual growth, but did not receive what they felt to be a satisfactory explanation. This, combined with their frustration over their inability to determine the status of the monies paid as "supplemental dues," caused the plaintiffs to look for help outside the Teamsters union.

After first seeking assistance from the Department of Labor, the plaintiffs sought the advice of a private attorney, Fernando Hernandez, in September 1988. Following an initial meeting with Hernandez, the plaintiffs brought a motion before the local union Executive Board to hire Hernandez to conduct an investigation into the supplemental dues and "other related matters." The motion passed, and the plaintiffs signed a retainer agreement with Hernandez on behalf of the local union.

In November 1988, as a result of Gullo's continued refusal to provide information regarding financial matters to the Executive Board, Hernandez filed an action against him in United States District Court on behalf of the individual plaintiffs and the union. The complaint alleged that in September 1987 Sandoval had requested an accounting of funds in Gullo's possession and that the bylaws of Local 287 require the secretary-treasurer to provide such an accounting, but that Gullo had failed to furnish one. The complaint further alleged that Gullo had diverted union funds to his own personal use. The complaint requested, inter alia, a full accounting and damages equal to the amount of funds misappropriated by Gullo.[2]

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[2]In addition to filing the action, Hernandez performed several other functions. Hernandez secured for the Executive Board a copy of the racial discrimination settlement agreement reached between Gullo (on behalf of Local 287) and Syble Coleman. Hernandez also wrote to Fleming Foods to advise it that it was illegal to allow campaigning at the company by the Gullo slate and not by other candidates.

Shortly after the action was filed, Sandoval found a check on his bulletin board made out to the Sick and Death Benefit Fund in the amount of $11,748.28. Sandoval asked Gullo about the check, and Gullo responded that he had just recently "found" the money in his safe. As Sandoval testified:

> "I says: Mario, what's this? . . . This check for the Sick and Death Benefit. Where did it come from? And he says: Oh, we found it in the safe. We found that money in the safe. . . . I told him: You mean — how convenient. After all this time you find the money in the safe? . . . He says: That's all I could tell you."

In December 1988, the union held its election for officers and business agents. Haas defeated Gullo in the campaign for the top post, secretary-treasurer, but Gullo's supporters were elected to a majority of the positions on the Executive Board. Sandoval was re-elected as president, while Brooke and Williams won positions as business agents.

The new Executive Board discharged attorney Hernandez. Gullo then filed internal union charges against the plaintiffs and Haas relating to the hiring of Hernandez and the institution of the action. The charges asserted that the plaintiffs' actions were "politically motivated and intended to harm [Gullo] and defraud the local union funds or credit in the amount of $13,000 . . . ." A hearing on the charges was scheduled for August 16, 1989, but on August 15 the meeting was cancelled by Haas, pursuant to his authority as secretary-treasurer. As a result, none of the plaintiffs attended the hearing. A panel of the local union, consisting of the Gullo supporters on the Executive Board and three others chosen by them, held a hearing at the time scheduled, and tried and convicted the plaintiffs in absentia. Each plaintiff was removed from office, fined $5,000, and ordered to reimburse the union for costs incurred by attorney Hernandez. The plaintiffs appealed their convictions to Teamsters Joint Council 7,

which subsequently reversed Haas's conviction, but affirmed the convictions of all plaintiffs here, although it reduced the fines to $500 each.[3]

On August 22, 1989, the plaintiffs filed a complaint in the United States District Court alleging that the assessment of fines against them and their removal from office constituted discipline in violation of the Labor Management Reporting and Disclosure Act. The complaint further alleged that the discipline was invalid because it was imposed in retaliation for plaintiffs' filing a legitimate lawsuit, in violation of § 101(a)(2) and (4) of the LMRDA, and that the hearings violated the plaintiff's right to due process in union disciplinary proceedings, in violation of § 101(a)(5).[4] In 1993, the plaintiffs and defendants filed summary judgment motions. The district court (Aguilar, D.J.) granted the plaintiffs' motion as to liability on the 101(a)(5) claim, holding that the original local union hearing denied the plaintiffs the process they were due under the Act, and that the Joint Council proceedings failed to cure these procedural defects. The court found that the first trial was "clearly biased given that plaintiffs' political opponents actively participated," *Haas v. Local 287*, 832 F. Supp. 283, 287, (N.D. Cal. 1993), and that the second trial before the Joint Council was "biased as a matter of law" due to the Council's reliance on the records of the original proceeding. *Id.* The court denied all other summary judgment motions, and the case, including damages on the § 101(a)(5)

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[3]Contemporaneously, Gullo filed similar charges with the Teamsters Joint Council seeking to overturn the 1988 election. A rerun election was ordered by the Council and held in September 1989. This time, all the plaintiffs were defeated and Gullo once again became secretary-treasurer of the local union.

[4]Section 101(a)(2) of the LMRDA protects union members' right to free speech in internal union matters; 101(a)(4) protects union members' right to sue their union or its officers; 101(a)(5) provides that no union member may be subject to internal union discipline without certain procedural safeguards. *See* 29 U.S.C. § 411(a)(2)-(5).

claim, went to trial on August 16, 1994 before District Judge Ingram.

From the outset, the district court and both parties have characterized this action as a "mixed motives case." Accordingly, the district judge instructed the jury on how to assess liability in a mixed-motives case under the LMRDA. The jury returned a verdict in the plaintiffs' favor, and awarded compensatory and punitive damages.[5] Following the jury's verdict, however, the court granted the defendants' motion for a new trial as to plaintiffs Brooke, Sandoval, and Williams.[6] The court ordered the new trial on the § 101(a)(2) and (a)(4) claims based on its understanding that the defendants' liability

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[5]The jury awarded the following damages:

For plaintiff Brooke, the jury awarded $126,420 in lost wages, $14,450 for emotional distress, and $57,795 for injury to reputation on the §§ 101(a)(2) and (a)(4) claims, and $250,000 on the (a)(5) violation, as well as $50,000 in punitive damages against the union, $4,000 in punitive damages against defendant Quintal, $3,000 in punitive damages against defendant Netto, $2,500 against Scoggins, and $3,000 against DeBrock.

For plaintiff Sandoval, the jury awarded $136,500 for lost wages, and $58,500 for injury to reputation on the §§ 101(a)(2) and (a)(4) claims, and $250,000 on the (a)(5) violation, as well as $50,000 in punitive damages against the union, $4,000 in punitive damages against defendant Quintal, $4,000 against Netto, $2,500 against Scoggins and $3,500 against DeBrock.

For plaintiff Williams, the jury awarded $5,600 for lost wages, and $22,400 for injury to reputation on the §§ 101(a)(2) and (a)(4) claims, and $250,000 on the (a)(5) violation, as well as $50,000 in punitive damages against the union, $4,000 in punitive damages against defendant Quintal, $3,000 against Netto, $2,500 against Scoggins, and $3,000 against DeBrock.

For Haas, the jury awarded $137,917 for lost wages, and $64,000 for injury to reputation on the §§ 101(a)(2) and (a)(4) claims, and $250,000 on the (a)(5) violation, as well as $50,000 in punitive damages against the union, $4,000 in punitive damages against Quintal, $3,500 against Netto, $3,000 against Scoggins, and $3,500 against DeBrock.

[6]Because Haas had not signed the contract with Hernandez, the District Court ordered only a remittitur in his case.

was to be assessed according to a mixed-motives regime, and that they had satisfied an affirmative defense available in mixed-motives cases.[7] In addition, the court ordered a new trial on damages on the plaintiffs' § 101(a)(5) claim, as to which liability had previously been established.

The second trial began on October 26, 1995. Again, it involved the plaintiffs' claims as to both liability and damages under §§ 101(a)(2) and (a)(4), and as to damages under (a)(5). The court again presented the jury with an LMRDA mixed-motives instruction identical in all relevant respects to that given during the first trial. This time, the jury returned a verdict for the defendants on the free speech and right to sue claims. As to the damages for the procedural due process violation, the jury awarded $5 to each plaintiff.

The plaintiffs appeal the district court's grant of a new trial following the original jury verdict, and the defendants cross-appeal the district court's grant of summary judgment on the plaintiffs' due process claim.

II.

The Appeal

[1] From the outset, both the parties and the district court have confused the issue by characterizing this litigation as presenting a "mixed motives" case. Indeed, the jury instructions were fashioned according to a mixed-motives liability regime. Most important for our purposes here, the district court's order setting aside the plaintiffs' verdict and directing a new trial was based on its understanding that the union had made out an affirmative defense available under a mixed-motives approach. As the district court wrote:

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[7]The court also ordered a new trial for the award of damages on the § 101(a)(5) violation, although it did not explain in its new trial order why the § 101(a)(5) damages awarded by the first jury were excessive or otherwise inappropriate.

> In this Court's view, the great weight of the evidence favors Defendants' affirmative defense that those plaintiffs would have been disciplined in any event for violating a reasonable rule of the Union even if the Defendants' disciplined them because of a retaliatory motivation.

The court derived this affirmative defense from *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977), the seminal Supreme Court case on mixed-motives liability. *Mt. Healthy,* and other true mixed-motives cases, however, involve the motives of the defendant. That is, a mixed-motives case calls on the court to determine what motive or motives led the defendant to take a disputed disciplinary action. When a defendant's motives are in dispute, a court resolves the case by determining whether the defendant "has shown by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Mt. Healthy,* 429 U.S. at 287. If a defendant makes this showing, in a case where its motives are the issue, it satisfies an affirmative defense and is entitled to judgment.

[2] This case, however, does not present a dispute as to what motivated the defendants to discipline the plaintiffs. All parties agree that the defendants disciplined the plaintiffs because the plaintiffs caused the Executive Board to retain Fernando Hernandez, to institute the action against Mario Gullo, the union's secretary-treasurer, and to obligate union funds in the process.[8] If that conduct is protected by the LMRDA, as the plaintiffs urge, the defendants' motives are irrelevant, at least as to liability.[9] The dispositive point in this

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[8]That Hernandez performed several other tasks at the Board's request, such as procuring a copy of the Syble Coleman racial-discrimination settlement and informing Fleming Foods about the requirements of federal labor law, in no way alters our analysis.

[9]As we explain later, in this case the plaintiffs' motives, as well as the defendants', are irrelevant.

case is that the conduct for which the plaintiffs were disciplined *was* lawful and may *not* constitute the basis for discipline under the LMRDA. The court, therefore, is not called on, as it is in a mixed-motives case, to determine what motivated the defendants to act. Although the confusion is understandable, and to a large degree was invited by the parties, the district court's new trial order was based on an erroneous legal theory.

[3] The question presented by this case, in contrast to the question raised in a mixed motives case, is whether there was a legitimate basis for the *plaintiffs*' actions: that is, whether there was legitimate reason for the three plaintiffs, members of the union's Executive Board, to cause the union to hire Hernandez and to have him file the action against Gullo on the union's behalf, with the concomitant expenditure of union funds. Stated plainly, if the plaintiffs had legitimate grounds to cause the hiring of Hernandez and the institution of the action, then their conduct is protected and the discipline imposed on them was improper. If, on the other hand, the plaintiffs had no legitimate basis for their actions, the discipline imposed on them may have been lawful. This is because, unlike in the ordinary § 101(a)(4) case, the union is not purporting to discipline the plaintiffs simply because they, in their capacity as members, caused an action to be filed against the union or its officers — conduct that in itself is wholly immune from discipline under the LMRDA — but because as executive board members they caused union funds to be used for that purpose. The issue in the case before us, therefore, is whether the use of such funds was proper and lawful.[10]

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[10]Because, as we explain below, we conclude that there was a legitimate basis for the action against Gullo, we need not consider whether the plaintiffs could have been disciplined had they acted in good faith, but in fact no legitimate basis in fact existed for their actions. It would be odd, however, were the LMRDA to permit the discipline of any persons seeking to recover union funds that they in good faith believed to have been improperly converted by a union official.

[4] To determine whether the plaintiffs had a legitimate basis to cause the union to retain the attorney and file the action we turn first to the LMRDA.[11] Section 501(a) of the LMRDA describes the "fiduciary responsibility of officers of labor organizations." Union officials such as Secretary-Treasurer Gullo "occupy positions of trust," and must "hold [the union's] money or property solely for the benefit of the organization and its members." 29 U.S.C. § 501(a). Equally important, § 501(b) dictates that:

> When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States . . . .

29 U.S.C. § 501(b). Implicit in the grant to union members of the right to sue when the governing board of the union fails to do so, is an obligation on the part of the executive board of a union to bring an action (or seek appropriate relief in some other manner) on behalf of the union against an officer when the board becomes aware that the officer has violated

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[11]Because the defendants have not questioned the plaintiffs' ability to bring this action under § 101(a)(2) and (4), we do not address that question here. We note, however, that union officers, like union members are protected by the LMRDA against discipline that affects their rights as union members. *See, e.g. Grand Lodge of the Int'l Ass'n of Machinists v. King*, 335 F.2d 340, 343-44 (9th Cir. 1964). The Supreme Court has held specifically that a "fine" is a "punitive action taken against union members as members." *Finnegan v. Leu*, 456 U.S. 431, 437-38. As the plaintiffs here were fined by the union, they are protected against improper discipline by the LMRDA. *See id.*

his § 501(a) duties. Of course, in bringing such an action, the board may use union funds. Accordingly, if, at the time they acted, the plaintiffs, as executive board members, had valid cause to believe that Gullo was violating his § 501(a) fiduciary duties, then they had the right, if not the duty, under § 501(b) to act as they did, and the discipline imposed upon them was unlawful.

[5] The evidence makes clear that the plaintiffs had valid cause to believe that Gullo was mishandling union funds. As stated above, the record demonstrates that during 1988, the plaintiffs came to believe that Gullo was mishandling several sources of union income. In particular, the plaintiffs had reason for concern about how Gullo was handling supplemental dues and the Sick & Death Benefit Fund. There appeared to be no records regarding the former, and as to the latter, the records suggested serious delinquencies. Perhaps most relevantly, in 1987 the union increased the monthly payments made by each member to the Sick and Death Benefit Fund, and in early 1988 plaintiff Sandoval became aware that despite this increase, there was no corresponding increase in the Fund's total value.

As a result of Gullo's repeated refusals to provide information regarding these financial matters to the Executive Board, the plaintiffs caused the action to be filed against him, alleging that he had used union funds for his own personal use. Shortly after the action was filed, moreover, plaintiff Sandoval found the check on his bulletin board made out to the Sick and Death Benefit Fund in the amount of $11,748.28. When questioned, Gullo said that he had belatedly found the money in his safe.

[6] In short, the evidence strongly supports the determination that at the time the plaintiffs hired Hernandez and caused the action to be brought against Gullo there was valid cause to believe that Gullo was mishandling the union's funds. That is to say, at the time the plaintiffs acted, they had valid cause

to believe that Gullo was violating his § 501(a) duty to hold the union's money "solely for the benefit of the organization." Under § 501(b), therefore, the plaintiffs' actions were both appropriate and consistent with their legal obligations, and a jury finding to that effect would not have been subject to reversal by the district court.

[7] Our conclusion that the plaintiffs' use of union funds to retain Hernandez and institute the action against Gullo was proper is further confirmed by Local 287's own Bylaws. The Bylaws allow the Executive Board to "[p]rovide for the employment and payment of attorneys," and "[o]n behalf of the Union, its officers, employees or members, to initiate, defend, compromise, settle, arbitrate or release or to pay the costs of any legal proceedings or actions of any nature if, in its judgment, it shall be necessary or desirable *to protect, preserve, or advance the interests of the organization*." Bylaws, Art. XVII, §§ 1(c) and (d). Under the bylaws, therefore, the relevant question is whether the hiring of Hernandez and the filing of the action served to "protect, preserve, or advance the interests" of the Union.

[8] The defendants are no doubt correct that an unmeritorious action filed solely to further the political interests of the union officials who cause its filing is not in the interests of the union. On the other hand, an action instituted to ensure that the union's secretary-treasurer is properly handling union funds is quite obviously one designed "to protect . . . the interests" of the union. Section 501 of the LMRDA, which requires all union officials to "hold [the union's] money or property solely for the benefit of the organization and its members," itself makes this clear. As we concluded above, the record demonstrates that there was a reasonable basis for the action against Gullo. The plaintiffs' actions, therefore, were appropriate under, if not mandated by, § 501(b) and were in the interests of the union.

[9] It is irrelevant that the plaintiffs referred to the lawsuit against Gullo in the subsequent union election campaign or

that they may have benefitted politically from it. It is also irrelevant that the plaintiffs may have been motivated, in whole or in part, by political considerations when they brought the action. When an action is brought to recover unlawfully expended union funds or to obtain a statutorily required accounting, a reasonable basis for the action is sufficient, under the LMRDA, to preclude discipline.

[10] While the district court based its jury instructions, at least in part, on the erroneous mixed-motives theory, it is clear that the jury was presented with and resolved the question that properly controls the outcome of this case: whether the plaintiffs had valid reason to cause the hiring of Hernandez and the institution of the action against Gullo.[12] The district judge first instructed the jury that if the plaintiffs sued Gullo "to safeguard the union's assets and property," then the plaintiffs' actions were protected. The judge then instructed the jury that "if you find by a preponderance of the evidence that there was a reasonable standard for the discipline of plaintiffs under the circumstances of this case, your verdict must be for defendants." The judge instructed that the plaintiffs could legitimately be disciplined if they violated the union rule "which restricts candidates for office from using Union funds . . . in support of their candidacy." That is, under the instructions actually given by the district court, in order to find for the plaintiffs the jury was required to determine that they were engaged in protected conduct, i.e., that they hired Hernandez and instituted the action against Gullo in order to safeguard union assets. On the other hand, the jury was to find for the defendants if it determined that the plaintiffs used

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[12]An error in civil jury instructions does not require reversal if the error was more probably than not harmless. *See, e.g., Mockler v. Multnomah Cty,* 140 F.3d 808, 812 (9th Cir. 1998). In *Westinghouse Elec. Corp. v. General Circuit Breaker & Supply, Inc.,* 106 F.3d 894, 902 (9th Cir. 1997), we explained that an instructional error is harmless where the verdict demonstrates that, despite the error, the jury necessarily found all elements legally necessary to support the verdict. *See also Benigni v. City of Hemet,* 879 F.2d 473, 480 (9th Cir. 1989).

union funds to hire Hernandez and pursue the action "in support of their candidacy" for union office. While the plaintiffs might indeed have been entitled to an even more favorable instruction than was given (i.e. that regardless of the plaintiff's actual motives, a verdict should be returned in their favor if they had a legitimate basis for their actions, or ironically, if *their* motives were mixed) that error does not help the defendants.[13] In returning a verdict in favor of the plaintiffs, the jury necessarily concluded that the hiring of Hernandez and the institution of the action were undertaken in the interests of the union and not "in support of [the plaintiffs'] candidacy" for union office.

[11] Under the instructions given, the jury's verdict reflects the critical determination that the plaintiffs' hiring of Hernandez and institution of the action against Gullo was undertaken in order to safeguard union assets. This is an appropriate determination under the proper theory of the case. The plaintiffs are entitled, therefore, to reinstatement of the original jury verdict.[14]

[12] The defendants also contend that the damages are excessive and warrant a new trial, and raise two specific issues in this regard: (1) an alleged error in the calculation of Sandoval's lost wages, and (2) excessiveness of the damages for the § 101(a)(5) (the procedural rights) violation. Because of the long and tortured history of both the factual and legal events in this internal union dispute, and the fact that this action for damages was filed a decade ago, we will be more

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[13]As we note above, the district court also instructed the jury that it had to find for the defendants if the *defendants* satisfied the "mixed-motives" affirmative defense. While the court relied on an erroneous legal theory in giving this instruction, the availability of such a defense, of course, could only have helped the defendants. The presence of this erroneous instruction does not, therefore, alter our conclusion that the verdict for the plaintiffs should be reinstated.

[14]Accordingly, we need not reach the appellants' claims regarding the second trial.

specific with respect to our directions regarding damages than we might otherwise be. We first conclude that while a remittitur may be appropriate, no new trial is necessary. Where an award of damages is "grossly excessive or monstrous, clearly not supported by the evidence, or only based on speculation or guesswork," *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 791 F.2d 1356, 1360 (9th Cir. 1986), and gives rise to an inference that "passion and prejudice" tainted the jury's finding of liability, a new trial may be in order. *See, e.g. Seymour v. Summa Vista Cinema, Inc.,* 809 F.2d 1385, 1387 (9th Cir. 1987). As we have made clear, however, "[w]here there is no evidence that passion and prejudice affected the liability finding, remittitur is an appropriate method of reducing an excessive verdict." *Seymour,* 809 F.2d at 1387. While there is some evidence that the jury miscalculated the stipend to which Sandoval was entitled, and while the defendants' arguments regarding the excessiveness of damages as to the due process claim may have some colorable merit, there is no evidence that the liability determination was in any way tainted by passion or prejudice. On remand, therefore, the district court may consider a remittitur of damages, but may not order a new trial.

In remitting damages, the court may adhere to the format it applied with respect to Haas, but not necessarily the monetary diminutions at which it arrived. In Haas's case, the court remitted the § 101(a)(5) damages to $1000, the punitive damages against the union to $25,000, and the punitive damages against the individual defendants to $500 per defendant. The court left unaffected the damages for lost wages and injury to reputation. Although the remittitur awarded with respect to Haas may have been appropriate in light of the assumptions on which it was based, we would point out that those assumptions are no longer valid. The district court assumed, for example, that there was no merit to Haas's underlying claims of unlawful discipline. It also assumed that Haas was less culpable than the other plaintiffs because he had not signed the employment contract with Hernandez. On remand, the district

court must consider any remittitur in light of our holding that the plaintiffs' underlying claims of wrongful discipline were valid, and that indeed they were all disciplined unlawfully. Our holding also, of course, serves to eliminate any consideration of disparate culpability. Thus, the district court should treat the remittitur in Haas's case as a floor not a ceiling. Indeed, it would be well within its discretion to permit the plaintiffs to receive substantially higher damages than those allowed to stand in Haas's case.

We add a few caveats. Because defendants have preserved the claim of error on appeal, the district court may consider any contention regarding the amount of Sandoval's lost wages and reduce the award in his case to account for any erroneous calculation in that regard. As to punitive damages, the defendants did not specifically object to that part of the damages award on appeal, although they alluded to the subject in the heading of a sub-section of their brief. Given all the circumstances, we conclude that the district court retains its jurisdiction to issue an appropriate remittitur with respect to punitive damages in the case of the individual defendants, but that with respect to the union it should exercise that discretion only if it is strongly persuaded that such action is required in the interests of justice. In accordance with our holding, the district court may also remit a reasonable portion of the § 101(a)(5) damages award should it deem such a remittitur appropriate, but it may not remit any part of the damages award for lost wages (other than as a result of any erroneous calculation affecting Sandoval) or for injury to reputation. Because the Haas damages verdict did not contain any emotional distress award and thus the district court was not called on to consider its appropriateness, we leave to the district judge's discretion the question whether the award to Brooke of such damages is subject to remittitur, although we note that defendants did not consider that part of the award so excessive as to be worthy of mention in its brief. Interest on the damages ultimately awarded by the district court shall be paid from the date of the original judgment, October 18, 1994. *See, e.g., American*

Telephone & Telegraph Co. v. United Computer Systems, Inc., 98 F.3d 1206, 1209 (9th Cir. 1996)(*citing Northrup Corp. v. Triad Int'l Marketing, S.A.*, 842 F.2d 1154, 1156 (9th Cir. 1988)). That judgment was legally sufficient to allow adequate "ascertainment of the damage[s]," subject, of course, to the remittitur ordered herein. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990).

III.

The Cross Appeal

We finally consider the defendants' argument that the district court erred in granting summary judgment on the plaintiffs' § 101(a)(5) due process claim. The defendants do not dispute the district court's finding that the first hearing, the hearing before the Local 287 board, was "clearly biased given that plaintiffs' political opponents actively participated." *Hass v. Local 287*, 832 F. Supp. 283, 287 (N.D. Cal. 1993). Rather, they dispute the district court's holding that the second hearing, before the Teamsters Joint Council, was biased as a matter of law and that it therefore did not cure the procedural deficiencies of the first hearing.

[13] A trial de novo is required to remedy a union disciplinary hearing that does not meet the due process standards of § 101(a)(5). *See Myers v. Affiliated Property Craftsmen*, 667 F.2d 817, 820 (9th Cir. 1982). Although a full trial de novo that results in an independent determination of the merits of the case can cure the procedural defects of a biased local union hearing, *see, e.g., Perry v. Milk Drivers & Dairy Employees Union, Local 302*, 656 F.2d 536, 539 (9th Cir. 1981), a mere review of the evidence or results of the previous hearing, is not sufficient to constitute such a trial. Here, the evidence presented to the Joint Council consisted almost entirely of the transcript of the first hearing (conducted before the biased Local 287 panel). A lengthy statement made at that hearing by Mario Gullo was introduced, but that hardly serves

to cure the defects of the first trial. The plaintiffs did not testify themselves, nor did they put on witnesses, and while the Joint Council did formally give the plaintiffs an opportunity to present evidence, it is clear from the record that the plaintiffs were not afforded adequate notice of that opportunity.[15] In short, the Joint Council appears to have relied primarily on the transcript of the local union hearing, and accordingly the second hearing did not constitute a trial de novo. Under these circumstances, the second proceeding fails to cure the procedural defects committed at the first.[16] We therefore affirm the district court's grant of summary judgment as to plaintiffs' § 101(a)(5) claim.[17]

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[15]Because of the lack of notice, the formal opportunity to testify afforded the plaintiffs does not render the Joint Council hearing a trial de novo. We do not, therefore, determine whether the Joint Council proceedings would have cured the procedural defects in the first hearing had the plaintiffs genuinely been afforded a full opportunity to testify.

[16]The defendants argue that the Declaration of Chuck Mack demonstrates that the Joint Council "conducted a full retrial of the charges . . . ; that the charged parties presented witnesses, and had an opportunity to cross-examine the charging parties' witnesses; that documentary evidence was presented; and that the Joint Council's decision was based upon its own consideration of the evidence presented." This contention is misleading at best. The portion of Chuck Mack's declaration, to which the defendants refer, deals with the second hearing of David Haas. The plaintiffs had a *separate* second hearing before the Joint Council. Mack's declaration makes this perfectly clear, and the transcripts of the two separate proceedings are contained in the record. Although Mack's declaration regarding the Haas hearings does state that "[t]he Joint Council conducted a full retrial of the charges made against Mr. Haas," such a statement is conspicuously absent from Mack's declaration regarding the plaintiffs' second hearing. Mack's declaration with regard to *plaintiffs'* second hearing also does *not* indicate that the "charged parties presented witnesses." It lends no support to the defendants' claim.

[17]We note that our decision finds support in the holdings of other circuits. In *Catlett v. Local 7370*, 69 F.3d 254 (8th Cir. 1995), for example, after the plaintiffs were disciplined by their local union, they appealed to the union International. The Eighth Circuit reiterated the rule that only a genuine trial de novo can cure procedural defects that occur at a union disciplinary hearing. *See id.* at 259. The court then held that because the

IV.

Conclusion

The district court's new trial order entered following the first trial is **REVERSED**. We **REMAND** to the district court for vacatur of the judgment following the jury's verdict in the second trial, for reinstatement of the jury's verdict in the first trial and entry of judgment in favor of the plaintiffs, and for consideration of a possible remittitur of damages. The district court's grant of summary judgment on the § 101(a)(5) claim is **AFFIRMED**.

REVERSED AND REMANDED IN PART, AFFIRMED IN PART.

International hearing panel relied on evidence presented at the earlier hearing, and because no oral testimony was taken at the hearing conducted by the union International, the second procedure did not constitute a trial de novo sufficient to cure the § 101(a)(5) defects of the first hearing. *See id.*

Likewise, in *Goodman v. Laborers International Union*, 742 F.2d 780, 785 (3rd Cir. 1984), the Third Circuit held that a second union disciplinary hearing did not constitute a trial de novo. The court concluded that incorporation of the record of the local union hearing into the evidence considered by the second panel was "improper" and undermined the "independence and objectivity" of the second hearing. *See id.* at 785. Despite the fact that the panel in the second hearing permitted the disciplined union member to put on a defense, the court found that the second proceeding could not cure any defects in the original local union hearing. *See id.*

APPENDIX B — MEMORANDUM OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED DECEMBER 20, 1994 AND FILED DECEMBER 29, 1994

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C 89-20531 WAI

DAVE HAAS, BILL BROOKE, ROBERT SANDOVAL, AND ROBERT WILLIAMS,

Plaintiffs,

vs.

FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 287, ED QUINTAL, ED DE BROCK, GEORGE NETTO, and LEE SCOGGINS

Defendants.

MEMORANDUM OF DECISION

Defendants' Motion for Judgment as a Matter of Law pursuant to the provisions of Federal Rule of Civil Procedure 50 is DENIED as to all plaintiffs and all defendants.

Defendants' Motion for New Trial is GRANTED as to all issues with respect to Plaintiffs Brooke, Williams and Sandoval. In this Court's view, the great weight of the evidence favors Defendants' affirmative defense that those

plaintiffs would have been disciplined in any event for violating a reasonable rule of the Union even if the Defendants disciplined them because of a retaliatory motivation. Plaintiffs Brooke, Williams and Sandoval admitted that they executed, on behalf of the Union, the retainer agreement with Attorney Hernandez. Hernandez testified that thereafter, and pursuant to his retainer, he performed services which appear directly related to the then-pending 1988 election campaign, the results of which were publicized in that campaign. Exs. G, H, I, J, K. No evidence significantly contradicts this conduct, and a new trial on issues of liability based on Defendants' alleged retaliation for Plaintiffs' exercise of rights specified in 29 U.S.C. §§ 411(a)(2) and 411(a)(4) is required.

The weight of the evidence with respect to the force of the affirmative defense is less compelling with respect to Plaintiff Haas, because he was not a signatory to the Hernandez retention agreement, and, while he was present for part of the initial meeting with Hernandez, he was excluded therefrom during the actual retention of Hernandez' legal services. Testimony of Haas. While there is circumstantial evidence which suggests that Haas was a beneficiary of the allegedly partisan efforts of Hernandez, it is not of the compelling weight necessary to justify the granting of a new trial in Plaintiff Haas' case.

The punitive damages assessed against the Defendants in favor of Haas are disproportionate to the Defendants' ability to respond, having regard to the extent of assets of each of the defendants.

Appendix B

The damages assessed in favor of Haas for violation of Section 101(a)(5) are without foundation in the evidence if construed as compensatory damages, and grossly disproportionate to the ability of the Defendants to respond if construed in whole or in part as exemplary damages.

The evidence does not, in the Court's view, require the granting of a new trial on the issue of Haas' alleged failure to mitigate damages.

Accordingly, the Court will deny the Motion for New Trial with respect to Plaintiff Haas, if Haas agrees to remit all sums over $1,000.00 with respect to the Section 101(a)(5) damages and all sums in excess of $25,000.00 assessed against Defendant Union as exemplary damages and all sums over $500.00 assessed as exemplary damages against Defendants Quintal, Netto, Scoggins, and De Brock.

Plaintiff's Motion for Attorneys Fees is denied without prejudice pending final resolution of the case. If counsel wishes to pursue the motion for fees incident to the representation of Plaintiff Haas, and if Mr. Haas agrees to the remittitur of damages above referred to, counsel may so move at his convenience.

DATED: 12 20 94

s/ William A. Ingram
WILLIAM A. INGRAM
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING IT IN PART AND DENYING DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT DATED AND FILED SEPTEMBER 27, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C 89-20531 WAI

DAVE HAAS; BILL BROOKE; ROBERT SANDOVAL; and ROBERT WILLIAMS,

Plaintiff,

vs.

FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 287; ED QUINTAL, ED DE BROCK; GEORGE NETTO; and LEE SCOGGINS,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING IT IN PART AND DENYING DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiffs' motion for partial summary judgment and defendants cross motion for summary judgment came on

regularly for hearing on August 12, 1993, before the Honorable Robert P. Aguilar. All parties appeared represented by counsel. Based on the pleadings, the submitted declarations and evidence, oral argument, the court records and good cause appearing therefor, the court GRANTS plaintiffs' motion in part and DENIES plaintiffs motion in part. The court DENIES defendants' cross motion for summary judgment.

I

FACTUAL BACKGROUND

This case arises out of a union dispute. During their membership in the International Brotherhood of Teamsters Local 287 Union ("Local 287"), plaintiffs became dissatisfied with the performance of the secretary-treasurer, Mario Gullo, and requested an accounting.

In order to investigate Gullo's conduct, the Executive Board, then comprised of plaintiffs Bill Brooke, Robert Sandoval, Robert Williams, and non-plaintiff Barton Wolin, adopted a resolution authorizing investigation of supplemental dues and related matters by attorney Fernando Hernandez.

Hernandez started an investigation of Local 287 for its charging of supplemental dues and instituted a lawsuit for an accounting of union finances against Gullo, the then secretary-treasurer.

Before the lawsuit had significantly advanced, an election was held and a reversal of power occurred within

the Executive Board. New union officers were elected. Plaintiff Haas defeated Gullo, and Haas became the new secretary-treasurer. Gullo's supporters (Quintal, De Brock, Netto and Scoggins), however, were elected to a majority of the Executive Board. Shortly thereafter, Gullo filed a protest with the new Executive Board. He claimed that the plaintiffs hired the attorney to investigate his handling of the union's finances simply to gain votes for Haas, the alternate candidate for secretary-treasurer.

On March 2, 1989, the union Joint Council convened to hear Gullo's election protest. The Joint Council set aside the election after finding several irregularities. The decision was appealed to the General Executive Board. The Executive Board, in turn, affirmed the Joint Council's decision.

Shortly after the re-run election, attorney Hernandez was discharged by the newly structured Executive Board.

A. *First Union Trial of Plaintiffs on Gullo's Charges*

A hearing on the internal charges filed by defendant Gullo was scheduled for August 16, 1989. On August 15, 1989, plaintiff Haas, who had power to cancel the hearing under the bylaws of the union, canceled the trial hearing. None of the plaintiffs attended the hearing because they assumed it to be canceled. Nonetheless, plaintiffs were tried and convicted in absentia.

Four of plaintiffs' political opponents, the defendants, sat as judges in this hearing. Plaintiffs were convicted.

Appendix C

As a result of their convictions, plaintiffs were removed from office, fined $5,000.00 and ordered to reimburse the union for the attorneys' fees accrued by Hernandez. Plaintiffs filed an application for a stay of discipline pending appeal with the International Board of Teamsters ("IBT") General President. The stay was granted. Plaintiffs were restored to office.

A re-run election to clean up the alleged campaign irregularities (*i.e.*, the hiring of attorney Hernandez to investigate Gullo) was held. Plaintiffs were defeated. Gullo was restored to his secretary-treasurer role.

Plaintiffs filed timely protest over the results of the re-run election with the Joint Council. Plaintiffs alleged that the convictions on Gullo's charges and their resulting brief removal from office were improperly used by Gullo, Quintal, De Brock, Netto and Scoggins in the re-run election campaign.

The Joint Council determined that the revelation of the plaintiffs' brief removal from office was not prejudicial to the result of the re-run election. The Joint Council upheld the election results. This finding was affirmed by the IBT Executive Board and the Secretary of Labor.

B. *Appeal of Convictions*

Plaintiffs then appealed their convictions on Gullo's charges to the Joint Council. The appeal was heard by the same Joint Council that had previously determined the first election invalid due to campaign irregularities related to the

hiring of attorney Hernandez. The appeal was supposed to be a de novo trial on the charges so as to cure any bias which may have been present in the first trial.

The Joint council reversed plaintiff Haas' conviction, but it affirmed the convictions of plaintiffs Brooke, Williams and Sandoval.

Plaintiffs then instituted this action alleging that defendants violated their union rights to free speech and assembly; their union right to initiate lawsuits; and their due process rights respecting union disciplinary actions.

II

DISCUSSION

A. *Standard of Review*

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper if no factual issues exist for trial. To survive a motion for summary judgment, the non-moving party must demonstrate that the fact in contention is material, *i.e.*, a fact that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 10 S. Ct. 2505, 2510 (1986). In addition, the non-moving party must demonstrate that the factual dispute is genuine, *i.e.*, the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.*

Appendix C

B. *Defendants' Cross Motion for Summary Judgment*

Can Plaintiffs recover damages caused by their defeat in the 1989 re-run election?

The legal issue to address in determining whether plaintiffs are entitled to recover damages, in this court, caused by their defeat in the 1989 re-run election is whether Title IV of the Labor Management Reporting and Disclosure Act ("LMRDA") deprives this court of jurisdiction. According to Title IV, this court has no jurisdiction over a private action which challenges the validity of an election. Such actions are governed by Title IV of LMRDA. Plaintiffs' exclusive remedy is to file a complaint with the Secretary of Labor. *Furniture Moving & Piano Drivers Local 82 v. Crowley*, 467 U.S. 526 (1984).

The *Crowley* case recognizes an exception to this exclusivity provision. Title IV may not bar post-election relief for Title I claims or other actions that do not directly challenge the validity of an election already conducted. *Id.* at 541.

Title I, 29 U.S.C. §§ 411-415, provides a bill of rights for union members. It guarantees equal rights and privileges to nominate and vote for candidates, as well as freedom of speech and assembly, and protection from improper discipline. Title I is enforceable in federal court through a private action filed by the aggrieved union members.

In contrast, Title IV, 29 U.S.C. §§ 481-483, sets detailed regulations aimed solely at protecting union democracy

through free and democratic elections. *Molina v. Union De Trabajadores De Muelles*, 762 F.2d 166, 167 (1st Cir. 1985), citing *Crowley, supra*.

In this case, plaintiffs are not seeking to set aside the re-run election rather they are seeking compensatory relief for torts related to the election. See *Kupau v. Yamamoto*, 622 F.2d 449, 455 (9th Cir. 1980); *Ross v. International Brotherhood of Electrical Workers*, 544 F.2d 1022, 1025 (9th Cir. 1976).

In *Kupau*, the court adopted a test to distinguish between Title I and Title IV remedies. "The crucial inquiry is whether a union member has been discriminated against in the exercise of his Title I rights. If so, 'then regardless of the other claims' his Title I cause of action is not preempted by the existence of Title IV claims." *Kupau*, at 455, citing *Depew v. Edmiston*, 386 F.2d 710, 712 (3rd Cir. 1967).

Plaintiffs are seeking monetary damages for violations of their rights under LMRDA and for wrongs that occurred prior to, during, and subsequent to the election and its campaign. Plaintiffs' complaint includes claims for financial injury, such as the fines imposed on them or lost wages which resulted from the LMRDA violations. They also seek damages for emotional distress and injury to their reputation. It is a question for the jury as to whether or not plaintiffs should recover compensatory damages for violation of Title I. *Bise v. International Brotherhood of Electrical Workers*, 618 F.2d 1299, 1305-06 (9th Cir. 1979); *Christopher v. Safeway Stores, Inc.*, 476 F. Supp. 950, 955 (S.D. Tex. 1979), aff'd 644 F.2d 467 (5th Cir. 1981), and *Ross v. International*

Brotherhood of Electrical Workers, 513 F.2d 840, 842-43 (9th Cir. 1975).

This court holds that defendants' cross-motion for summary judgment on the grounds of no jurisdiction is denied. The court properly has jurisdiction over the matters at hand, and there are genuine issues of material fact to be litigated at trial.

C. *Plaintiffs Motion for Partial Summary Judgment*

1. Did defendants violate plaintiffs' right of due process in union disciplinary proceedings?

Under Section 101(a)(5) of LMRDA, a union member may not be disciplined unless (a) served with written specific charges; (b) given a reasonable time to prepare his defense; and (c) afforded a full and fair hearing. The charges must be specific enough to inform the accused member of the offense that he has allegedly committed. He must be given a reasonable period of time to prepare his defense once he knows the nature of the accusations against him. *International Brotherhood of Boilermakers v. Hardean*, 401 U.S. 233 (1971).

Plaintiffs allege that no fair and impartial hearing was conducted at either the initial hearing or the second trial de novo. A fair hearing is one before a neutral and disinterested body that has not pre-judged the case. One biased member may be sufficient to taint a hearing. *Myers v. Affiliated Property Craftsmen, etc.*, 667 F.2d 817, 820 (9th Cir. 1982).

Appendix C

The first trial was clearly biased given that plaintiffs' political opponents actively participated. According to *Goodman v. Laborers' Intern. Union of North America*, 742 F.2d 780, 783 (3rd Cir. 1984), the court reasoned that failure to attend a trial hearing and to raise the issue of bias of the trial board does not preclude a plaintiff from raising the issue in a court proceeding under LMRDA. *Goodman*, citing *Falcone v. Dantinne*, 420 F.2d 1157, 1161-62 (3rd Cir. 1969). In that case, it was held that it was the responsibility of the defendants to disqualify themselves for bias whether or not plaintiff had actually attended the hearing.

This court finds that the second trial de novo was biased as a matter of law. Plaintiffs allege that the Joint Council ("JC") trial de novo did not cure procedural defects in the first trial because: 1) the JC was biased in that it had previously reviewed the election and made the determination that the initial election was faulty due to campaign irregularities; 2) in the de novo hearing, the JC relied on evidence from the previously tainted hearing; 3) plaintiffs were not apprised of the charges against them and were convicted on entirely different charges than those set out in the written complaint; and 4) plaintiffs were not apprised that the hearing was to be a de novo hearing.

A trial de novo must be fair and impartial as any other trial under Section 101(a)(5) of LMRDA. *Goodman*, *supra* at 785. Use of records from a prior tainted proceeding in a later hearing can taint the hearing. *Goodman* at 785; see also *Tincher v. Piasecki*, 520 F. 2d 851 (7th Cir. 1975). In *Tincher*, the court invalidated a union disciplinary proceeding. This was done because the tribunal had considered a report, which

it had prepared after convicting the accused at a prior trial, the result of which had been set aside because the accused had received inadequate notice of the charges against him. Although there is no per se rule which would preclude use of information from a previous tainted trial, the *Tincher* case indicates that use of such information would be subject to strict scrutiny. *Rosario v. Amalgamated Ladies Garment Cutters Union Local 10 Etc.*, 605 F.2d 1228, 1244 (2nd Cir. 1979).

Based on a combination of the fact that plaintiffs' political opponents served as the trial judges and the use of tainted evidence, this court rules that the first and second trials denied plaintiffs the due process guaranteed them under the LMRDA.

2. Did defendants violate Section 101(a)(4) of LMRDA by disciplining plaintiffs Brooke, Williams and Sandoval because they instituted a lawsuit against Mario Gullo?

This court holds that summary judgment should not be granted on this issue, as questions of material fact remain to be decided by the jury. It has not yet been determined whether or not plaintiffs were disciplined because they initiated the lawsuit or because they went beyond the boundaries of the Executive Board's resolution in investigating Gullo. If the discipline stemmed from misuse of the attorney's time, it would not be related to individual rights but proper union management and use of union finances.

Section 101(a)(4) of the LMRDA expressly protects the right of union members to institute lawsuits:

Appendix C

"No labor organization shall limit the right of any member thereof to institute an action in any court. . . ."

In contrast to the above, however, defendants are claiming that plaintiffs were not disciplined for violation of this section but for misusing union moneys. They claim plaintiffs actions breached their fiduciary duties in fostering their campaign objections.

Given that there appears to be a continuing question of fact on the purpose of the discipline, the case is not ripe for summary judgment at this time on this issue.

IV

CONCLUSION

For the reasons stated above this court hereby DENIES defendants' cross motion for summary judgment on the jurisdictional issue, GRANTS plaintiffs' motion for summary judgment on the due process issue and DENIES plaintiffs' motion for summary judgment on the 101(a)(4) claim.

IT IS SO ORDERED.

DATED: September 27, 1993

s/ Robert P. Aguilar
ROBERT P. AGUILAR
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 7, 1999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 96-15267
96-15274

DC# CV-89-20531-WAI

SANDY SNYDER, ADMINISTRATOR
OF THE ESTATE OF DAVID HAAS,

Plaintiff,

and

BILL BROOKE; ROBERT SANDOVAL;
and ROBERT WILLIAMS,

Plaintiffs-Appellants-
Cross-Appellees

v.

FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 287; ED QUINTAL; ED DE BROCK; GEORGE NETTO; and LEE SCOGGINS,

Defendants-Appellees-
Cross-Appellants.

Appendix D

ORDER

Before: REINHARDT, NOONAN, and THOMPSON, Circuit Judges:

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Thompson have voted to reject the suggestion for rehearing en banc and Judge Noonan so recommends.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX E — RELEVANT STATUTES

29 U.S.C. § 411(a)(2), (a)(4) and (a)(5)

§411. Bill of rights: constitution and bylaws of labor organizations

(a)(2) Freedom of speech and assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * *

(a)(4) Protection of the right to sue

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respōndents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but

not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

* * *

(a)(5) Safeguards against improper disciplinary action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

* * *

29 U.S.C. § 481(g)

(g) Use of dues, assessments or similar levies, and funds of employer for promotion of candidacy of person

No moneys received by any labor organization by way of dies, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in any election subject to the provisions of this subchapter. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

* * * *

APPENDIX F — JURY INSTRUCTION RE LIABILITY

In order to establish their claim that they were disciplined in retaliation for their exercise of rights protected by the LMRDA, each plaintiff must first make an initial showing that he was disciplined under circumstances which give rise to an inference of retaliation.

This requires each plaintiff initially to prove each of the following propositions:

One, that the conduct he engaged in was protected by the LMRDA.

Two, the defendants' decision to discipline plaintiff was made in significant part because of his exercise of these protected rights.

And, three, that he suffered an injury as a proximate result of the disciplines taken by defendants.

If you find that plaintiffs have failed to prove by a preponderance of the evidence any one of those elements, your verdict must be for the defendants.

I have just instructed you regarding plaintiffs' burden of proof and the elements which are necessary to make out a "prima facie" case of retaliatory discipline. I will now instruct you on the defendants' burden of proof with respect to an affirmative defense.

If you find that plaintiffs have established each of the elements necessary to make out a prima facie case of

retaliation for their exercise of legally protected rights, then defendants may rebut that inference by proving by a preponderance of the evidence that the plaintiffs would have been disciplined for violating a reasonable rule of the Union even if defendants had not been motivated by an improper purpose. And that's for the defense to prove.

Therefore, if you find by a preponderance of the evidence that there was reasonable standard for the discipline of plaintiffs under the circumstances of this case, your verdict must be for the defendants. You must keep in mind that the ultimate burden of proving their claim always is upon plaintiffs.

Supreme Court, U.S.
FILED
OCT 1 1999
OFFICE OF THE CLERK

No. 99-402

In The

Supreme Court of the United States

FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL 287; ED QUINTAL; ED DEBROCK; GEORGE NETTO; LEE SCOGGINS,

Petitioners,

vs.

BILL BROOKE; ROBERT SANDOVAL; ROBERT WILLIAMS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, in a case arising under the LMRDA's Bill of Rights in which union members had an objectively valid basis for the belief that union funds were being misused and were disciplined expressly because they instituted a lawsuit for an accounting of union funds, the Ninth Circuit correctly determined that the jury's finding that union members did not violate union rules because they acted for the lawful purpose of securing an accounting of union funds made it unnecessary to decide whether the jury was properly instructed under the standards of *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), for determining whether proper or improper motives predominated in the minds of the union officials who took the disciplinary action against the members.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Bill Brooke, Robert Sandoval and Robert Williams (hereafter "Respondents"), oppose the Petition for Certiorari (herein the "Petition") filed by Petitioners Freight, Construction, General Drivers, Warehousemen & Helpers Local 287 and Ed Quintal, Ed DeBrock, George Netto and Lee Scoggins (herein collectively referred to as the "Union").

STATUTORY PROVISIONS

Appendix E to the Petition reproduces the pertinent text of Section 101(a)(2), Section 101(a)(4) and Section 101(a)(5) of the Labor Management Reporting and Disclosure Act ("LMRDA") (29 U.S.C. §§ 411(a)(2), (4) and (5)). In addition to the statutory provisions reproduced in Appendix E to the Petition, sections 501(a), 501(b) and 609 of the LMRDA (29 U.S.C. §§ 501(a), 501(b), 529) are relevant to consideration of this Petition. These additional statutory provisions are reproduced in Appendix A to this Brief in Opposition.

STATEMENT OF THE CASE

A. The Union Misstates The Record In Asserting That This Case Presents Both Permissible And Impermissible Conduct By Respondents: The Jury Rejected The Union's Argument That Respondents Engaged In Conduct For The Impermissible Purpose Of Supporting Their Election Candidacy.

This case grows out of internal union discipline imposed on Respondents by their political opponents.[1] Respondents were all union officers and members of the Union's Executive Board. Respondent Robert Sandoval was President, Respondent Bill Brooke was Vice President and Respondent Robert Williams was an Executive Board member.

During 1988, Respondents – together with a fourth member of the Executive Board (Bart Wolin)[2] who is not involved in this action – became increasingly concerned about the manner in which Mario Gullo, the Union's Secretary Treasurer, was handling the Union's funds and other assets. As a result of these concerns, Respondents, together with the fourth Board member Wolin, instituted a lawsuit on the Union's behalf seeking an accounting of Union funds by Secretary-Treasurer Gullo.

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[1] Prior to trial, the District Court granted summary judgment on Respondents' claims under section 101(a)(5), finding that the union trial board – composed entirely of Respondents' political opponents – was biased against them (Petition, Appendix C, pp. 37a-39a). The Ninth Circuit affirmed this conclusion (Petition, Appendix A, pp. 24a-25a) and the Union does not challenge this decision.

[2] Four members of the Executive Board constituted a majority of the Board.

After political power on the Executive Board shifted in early 1989,[3] Respondents were accused and convicted of violating Union rules by instituting the lawsuit against Gullo.

In support of this discipline, at trial the Union contended that the lawsuit was instituted merely to support Respondents' candidacy in the upcoming union election because the lawsuit's allegations of misconduct by Gullo were repeated in campaign literature distributed and paid for by the anti-Gullo campaign slate which included Respondents.[4] Respondents, on the other hand, testified that they instituted the lawsuit to protect the interests of the Union and in their capacity as union fiduciaries on the Executive Board (RT Vol. IV, pp. 116-118, 133, 137-139, 146-147; Vol. V, pp. 131, 153-154, 210-214, Vol. VI, pp. 102-103).[5]

The jury was presented with these competing claims. The jury returned a verdict in Respondents' favor on all counts.

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[3] That is, Respondents plus Wolin no longer constituted a four-member majority of the Board.

[4] The Union has never contended that its rules prohibited campaign material discussing either the lawsuit or the misconduct of Gullo which led to the lawsuit. Rather, the Union sought to convince the jury that the lawsuit was instituted purely to support Respondents' candidacy, rather than to remedy Gullo's misconduct, because campaign literature thereafter referred to the lawsuit. Such weight, if any, this inference might have was indisputably for the jury to resolve.

[5] "RT" refers to the Reporter's Transcript in the initial trial. "Exh." Refers to the number or letter of the exhibits introduced at the initial trial.

The trial court set this verdict aside, but the Court of Appeals reinstated it. In a unanimous opinion, the Ninth Circuit held that the evidence "makes clear that plaintiffs had valid cause to believe that Gullo was mishandling union funds" (Petition, Appendix A, p. 18a). Finding valid cause to believe Gullo was mishandling union funds, the Court of Appeals concluded that it was "irrelevant that the plaintiffs referred to the lawsuit against Gullo in the subsequent union election campaign or that they may have benefited politically from it. * * * When an action is brought to recover unlawfully expended union funds or to obtain a statutorily required accounting, a reasonable basis for the action is sufficient, under the LMRDA, to preclude discipline" (Petition, Appendix A, pp. 19a-20a).

The Ninth Circuit held that giving a "mixed-motive" instruction based on *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)[6] was erroneous because the Union's motive for the discipline was undisputed – namely, it was undisputed that the discipline was based on the filing of the lawsuit against Gullo (Petition, Appendix A, pp. 15a-16a). Rather, the question presented was whether *Respondents* were motivated merely to support their election candidacy, in violation of the unions' rule, or were acting as union fiduciaries for the benefit of the union as a whole (id., at pp. 16a-19a). Since the jury

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[6] This instruction was proposed by the Union over Respondents' objections (RT Vol. XI, pp. 56-58). The jury nevertheless returned a verdict in Respondents' favor, rejecting this proffered defense.

had resolved the disputed issues under the other instructions and returned a verdict in Respondents' favor, the Ninth Circuit concluded that giving the "mixed-motive" instruction, proposed by the Union, was harmless error (Petition, Appendix A, pp. 20a-21a).

B. The Union's Claim That Respondents Engaged In Conduct For Both Permissible And Impermissible Purposes Rests On A Presentation Of Only The Evidence Favoring The Union's Contentions Rather Than The Contrary Evidence The Jury Accepted.

In presenting its Petition seeking review, the Union presents only the evidence favorable to its assertion that Respondents acted with an impermissible purpose to support their election candidacy, in violation of the Union's rules prohibiting the use of union funds to support a candidate for union office (Petition, pp. 6-10, 19-21). The Jury did not accept this argument. The Jury accepted the contrary evidence showing that Respondents acted solely to protect the union assets in the face of Secretary-Treasurer Gullo's inability or unwillingness to account for union funds under his control.

Because Respondents are defending the jury's verdict, they are entitled to have the evidence construed most favorably to the verdict. In addressing the specific factual assertions by the Union offered to support its claim that Respondents acted merely to support their election candidacy (Petition pp. 6-10), Respondents present the evidence in that light.

1. *Power of the Executive Board to hire attorneys as part of their fiduciary obligations to the membership as a whole.* The Bylaws allocate the power to hire attorneys and

institute legal proceedings to the Executive Board (Article XVII, Section 1(c), (d) (Exh. 39, p. 24)). The Bylaws provide that the Executive Board may "[p]rovide for the *employment* and *payment* of attorneys," and "[o]n behalf of the Union, its officers, employees and members, to initiate, defend, compromise, settle, arbitrate or release or to pay the costs of any legal proceedings or actions or any nature if, in its judgment, it shall be necessary or desirable to protect, preserve, or advance the interests of the organization." Bylaws, Article XVII, Section 1(c), (d) (emphasis supplied) (Exh. 39, p. 24).

Nothing in the Bylaws allows a membership meeting, attended by a small fraction of the union's entire membership, to overrule a decision by the Executive Board to retain a lawyer to investigate misconduct affecting the entire union (compare Petition, p. 7).[7]

2. *The Executive Board was entitled to a copy of the Coleman settlement that Gullo withheld.* Gullo refused to supply the Executive Board with a copy of the Syble Coleman settlement. Although requested, neither Gullo nor the Union's regular attorneys (Beeson, Tayer & Bodine) were able or willing to supply the Board with a copy

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[7] To the contrary, the Executive Board's obligation as fiduciaries under section 501(a) was to protect the interests of the entire membership of the Union as a whole – including the majority of the membership who did not attend the particular meeting to which Gullo brought his supporters to attempt to derail the investigation against him. See, generally, *Morrissey v. Curran*, 423 F.2d 393, 399 (2d Cir. 1970); *Highway Truck Drivers and Helpers Local 107 v. Cohen*, 182 F.Supp. 608, 617-18 (E.D.Pa), aff'd 284 F.2d 162 (3d Cir. 1960).

of the written settlement agreement containing the specific terms of the settlement. Respondents expressly asked for the documents before voting on the settlement proposal but were told they had to approve the settlement notwithstanding that neither Gullo nor the union's attorney had a copy for the Board to review (RT Vol. IV, pp. 124-125; Vol. V, pp. 147-148, 203-206). Respondents never received a copy of the Coleman settlement from Gullo (RT Vol. V, p. 213 lines 21-22).

The Union's own principal witness testified that the Executive Board was entitled to a copy of this settlement before voting on it (RT Vol. VIII, pp. 149-150). The settlement became public because it was disclosed to the members at the following membership meeting under the Union's normal practice and it was the members at that meeting, not Respondents, who began publicly questioning the settlement (RT Vol. V, pp. 142-144).

3. *A majority of the Executive Board approved the continued investigation of Gullo and the lawsuit pursuant to the express provisions of the Bylaws allowing actions by a majority of the Board both at and outside of meetings.* Because the hiring of Hernandez did not induce Gullo to provide the Executive Board with the financial and other information that concerned the Board, the Executive Board majority approved going ahead with the lawsuit. The Executive Board majority signed a Verification for the Complaint that Hernandez filed initiating the lawsuit against Gullo for an accounting and other relief (RT Vol. IV, pp. 138-139, Exh. 13). On the same date, the Executive Board majority wrote the union's regular attorneys – the Beeson, Tayer & Bodine firm – reaffirming Herndandez' authority (RT Vol. IV, pp. 134-136, Exh. 12):

> You do represent Local 287 on regular union matters, but not on this matter of Mario Gullo. * * * A majority of the Board has decided to seek outside legal and accounting assistance in this investigation.

Shortly after the lawsuit was filed, Gullo produced a check for $11,748.23 made out to the Sick and Death Benefit Fund (Petition, Appendix A, p. 11a). Gullo explained: "We found the money in the safe" (id., p. 11a).

The Bylaws do not require the Executive Board to act only at formal meetings (compare Petition, pp. 8-9, 19-20). The Bylaws allow a majority of the Executive Board to act outside of regular meetings: "On matters requiring action by the Executive Board, when the Executive Board is not in formal session, the Executive Board may act by telegram, letter or telephone" (Article XVII, Section 5 (Exh. 39, p. 26)). The Bylaws further provide that "[s]uch action so taken by a majority of the members of the Executive Board shall constitute action of the Board as though the Board were in formal session" (id.). The written approval by the majority for the continued investigation and the lawsuit (Exhs. 12, 13) complied with these rules.[8]

4. *The Executive Board had the obligation to ensure that Gullo did not violate election rules by campaigning at Fleming Foods.* During the course of the union election, Gullo and his supporters used their official union positions to gain

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[8] In at least one prior case, both the Teamsters Union and the Ninth Circuit had approved actions by a Teamster Local Union outside of formal executive board meetings when the executive board was investigating misconduct by a secretary-treasurer. *Building Material and Dump Truck Drivers, Local 420 v. Traweek*, 867 F.2d 500, 504, 512 (9th Cir. 1989).

access to the premises of Fleming Foods – a large employer of Union members – to campaign for their reelection, in violation of the Union's election rules (RT Vol. V, pp. 129-130, Vol. VIII, p. 152). Hernandez wrote a letter to Fleming Foods, and the problem stopped.

Again, the Union's principal witness testified that stopping illegal campaigning would be proper action on behalf of the Union as a whole. He testified that, if the executive board found out about illegal campaigning, "they'd take steps to stop it" before the election took place (id. pp. 153-154).[9]

REASONS FOR DENYING THE PETITION

Although couched as a dispute over the application of *Mt. Healthy City School Dist. Bd. of Educ. v. Dole* in the context of the LMRDA, in reality the Petition does no more than take issue with a jury's factual findings against the Union on the detailed and particular facts of this case.

Respondents were all fiduciaries, with a statutory duty under the LMRDA to protect and preserve the union's funds for the benefit of its whole membership. Secretary-Treasurer Gullo's wrongdoing and failure to account for union funds is undisputed. A majority of the

[9] In any event, Respondents had arranged with Hernandez that he would work on a separate contingency fee basis with them for disputes involving Fleming Foods rather than charge the Union for legal services concerning Fleming Foods (RT Vol. V, pp. 130-131). The jury, of course, was free to credit Respondents' evidence on this point and apparently did so.

Executive Board indisputably authorized the lawsuit against Gullo and the investigation of Gullo by independent attorney Hernandez to remedy Gullo's misconduct. Indeed, the lawsuit had the immediate benefit of the recovery of $11,748.28 which Gullo claimed to have suddenly found "in the safe" (Petition, Appendix A, p. 11a).

Notwithstanding the undisputed factual basis for Respondents' concerns and the immediate benefit the lawsuit brought to the union, Respondents were subjected to union discipline for the institution of the lawsuit to remedy Gullo's failure to account for union funds – a lawsuit that represented the very kind of fiduciary responsibility the LMRDA seeks to encourage. This disciplinary action was imposed in undisputed violation of the due process section of the LMRDA,[10] by Respondents' political opponents – the supporters of Mario Gullo against whom the lawsuit had been brought. There was also no dispute as to the motive for the discipline – the charge and the conviction were premised explicitly on the institution of the lawsuit against Gullo.

This case, therefore, presents nothing more significant than a case – all too common – where a union has used its internal disciplinary process to retaliate against its political opposition in order to quell dissent and punish challenge to incumbent union officials. The Teamsters Union is no stranger to this story, as it currently operates under a consent decree designed to afford additional protection against the kind of abuse represented in this case.

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[10] See footnote 1, supra.

While the Union denied wrongdoing and sought to justify the discipline under its election rule prohibiting use of union funds to support a candidate in union elections, the jury in this case concluded that Respondents were the victims of exactly the type of retaliation prohibited by the LMRDA and were not disciplined for violating the union's election rule. That conclusion resolved all the relevant issues in this case without reference to the "mixed-motive" situation represented by *Mt. Healthy*. The only question these facts presented was whether Respondents instituted the lawsuit for the benefit of the union to remedy Gullo's misconduct or merely as a tactic to support Respondents' candidacy in the upcoming union election.

Nothing in the Petition shows that this case presents anything other than a factual dispute as to Respondents' purpose in instituting the lawsuit against Gullo, which was resolved by the jury in Respondents' favor. The Petition represents nothing more than a rehash of the factually-based contentions the Union urged upon the jury and which the jury ultimately rejected.

A. This Petition Does Not Present A Case Involving The Enforcement Of Union Rules Or "Mixed-Motives" Because The Jury Rejected The Union's Claim That Respondents Violated Any Union Rule.

The Union rests its Petition on the idea that Respondents indisputably used union funds for both permissible and impermissible purposes in violation of union election rules prohibiting the use of union funds to support a candidacy in a union election (Petition, pp. 19-26). This

contention rests on entirely mistaken premises that Respondents violated any union rule or that the Union acted with "mixed-motives". Rather, the Union's only motive for the discipline was the charge that Respondents violated the union's rules by suing Gullo. The Jury rejected the Union's contention that Respondents violated its rules. As the Ninth Circuit noted – and the Union does not dispute – Respondents were fiduciaries with a statutory duty under section 501(a) and 501(b) of the LMRDA to take action on behalf of the Union as an entity in the face of Gullo's misconduct (Petition, Appendix A, 17a-19a).

a. The Jury's determination that Respondents' purpose in instituting the lawsuit was to protect the interests of the Union and not to support their candidacy in the union election disposes of the Union's principal contention in this Court (Petition pp. 19-22). Thus, this case does *not* present the question whether Respondents acted for both permissible purposes – i.e., protecting the Union's finances – and impermissible purposes – i.e., support of their candidacy in the upcoming union election. Instead, this case presents *only* the factual issue whether Respondents had valid cause to believe Gullo was misusing union funds – as both the Jury and the Ninth Circuit found was the case.

This Court is not the place to review factbound determinations of motive and purpose, which depend on the particular facts of this case and the credibility of Respondents' own testimony that they were acting to benefit the union and not to support their candidacy in the upcoming union election. Respondents' purpose was disputed and fully-litigated at trial. The Jury accepted Respondents

testimony that they were acting for the benefit of the Union not to support their candidacy in the election. The Union's characterization of Respondents' actions as violating the union's election rules (Petition pp. 19-22) simply repeats the arguments it made to the Jury in support of the claim that Respondents were acting to support their candidacy in the upcoming union election and which the Jury rejected based on substantial contrary evidence.

b. This case also does not raise any question as to the Union's right to enforce reasonable union rules under *United Steel Workers v. Sadlowski*, 457 U.S. 102 (1982) (see Petition, pp. 22-24). The Ninth Circuit did not dispute the Union's right to have reasonable rules governing the use of union funds (Petition, Appendix A, p. 19a). As the Ninth Circuit held, however, under the instructions given, the Jury found that Respondents had not violated any such union rule (Petition, Appendix A, pp. 20a-21a). Whether Respondents violated any Union rule was a disputed factual issue for the Jury to resolve.

Thus, the issue was not whether the election rule was valid under the "two-tier" test established in *Sadlowski*. The abstract validity of a rule prohibiting use of union funds to support candidates in union elections was acknowledged by everyone.[11] The issue, resolved by the

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[11] Thus, the policy of section 401(g) (Petition, p. 23 n. 8) is irrelevant. In passing, however, Respondents note that neither this Court, the lower courts, nor the Department of Labor has extended section 401(g) to include election-related lawsuits brought in good faith. *United Steel Workers v. Sadlowski*, supra, 457 U.S. at 119 and 119-121 (part III of opinion: "The outsider

Jury, was whether or not Respondents in fact violated any such rule on the particular facts of this case.

c. This case does not present any question respecting the accepted framework for "mixed-motive" cases established in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (see Petition pp. 24-26). The *Mt. Healthy* test requires showing that, where two reasons for discipline were present at the time of the decision, one legal and one illegal, the same action would have been taken in any event based on the independent alternative legal reason standing alone (see Petition, pp. 24-26, 27).[12]

However, as the Ninth Circuit held, *Mt. Healthy* was inapplicable because the *Union's* motive for the disciplinary action was undisputed, not "mixed" (Petition, Appendix A, pp. 15a-18a). The only claimed motive for the

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rule would clearly violate [section 101(a)(4)] if it prohibited union members from accepting financial or other support from nonmembers for purpose of conducting campaign-related litigation"); *Retail Clerks Union, Local 648 v. Retail Clerks International Association*, 299 F.Supp. 1012, 1024 (D.D.C. 1969); 29 C.F.R. § 452.77 and n. 39.

[12] In this respect, the Union seriously misstates the *Mt. Healthy* test in asserting that it involves merely proof of "a permissible basis for [the] decision" (Petition, p. 24, subparagraph c, second paragraph, last sentence). This Court has regularly noted that proof under *Mt. Healthy* requires more than a "permissible basis" for disciplinary action:

> As we have observed, "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360 (1995), quoting from *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989).

discipline was the stated one – the filing of the lawsuit against Gullo, which at trial the Union claimed was instituted to support Respondents' candidacy in the upcoming election (Petition, Appendix A, pp. 15a-16a). The only disputed question of motive presented by the case was *Respondents'* motive in instituting the lawsuit: namely, were they acting for the benefit of the Union as a whole or merely to support their election candidacy? (Petition, Appendix A, pp. 16a, 20a-21a). If the former, Respondents' actions were protected by the LMRDA; if the latter, Respondents could be subject to union discipline for violating union rules (Petition, Appendix A, pp. 17a-20a). The jury was presented with this issue on the particular facts of this case and resolved the issue in Respondents' favor (Petition, Appendix A, pp. 20a-21a).

Although the Petition argues that Respondents violated other union rules (Petition pp. 8-10, 19-21), Respondents argued these purported violations to the Jury in support of its claim that Respondents violated its election rule. The Jury, as discussed above, rejected this argument.

i. Even assuming that the jury's verdict is not dispositive of the issue of these other alleged violations, the Union failed to present these alleged violations as independent alternative grounds for disciplinary action in the context of *Mt. Healthy*. These rule violations were presented to the jury only as evidence that Respondents violated the union's election rule. The Union offered no separate instruction on these other alleged rule violations and made no argument in the court of appeals that the jury should have been instructed on these other alleged violations. The only rule violation on which the jury was instructed was the rule prohibiting union officers from

using union funds to support their candidacy in elections (RT Vol. XII, pp. 138-140).

ii. In addition, none of these alleged violations could have properly supported a "mixed-motive" defense.

The internal union charges filed against Respondents were limited to the filing of the lawsuit (Exh. 21). Since these alleged violations were not charged before the Union at the time of the disciplinary action, the Union could not have imposed discipline on these alternative grounds as independent alternative reasons for the discipline. As this court has previously recognized, the "mixed-motive" analysis in *Mt. Healthy* is simply inapplicable to uncharged rule violations that could not have been part of the motivation for the disciplinary action at the time the action was taken (*McKennon v. National Banner Publishing Co.*, supra, 513 U.S at 360).[13]

d. Once the jury resolved the question of *Respondents'* motive, Ninth Circuit properly concluded that giving a further instruction on the *Union's* "mixed-motive" was erroneous since, in this particular case, the Union's motive was not "mixed" at all. Nevertheless, since the jury rejected this defense as well under instructions proposed by the Union itself (Petition, Appendix A, pp. 20a-21a), the error was harmless, because instructing on a

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[13] The *Mt. Healthy* "mixed-motive" situation cannot arise based on "knowledge that [the defendant] did not have" at the time of the decision (*McKennon v. National Banner Publishing Co.*, supra, 513 U.S at 360). Section 101(a)(5)(A) of the LMRDA also prohibits all discipline unless the member was "served with written specific charges" before the hearing.

"mixed-motive" affirmative defense could "only have helped the defendants" (Petition, Appendix A, p. 21a footnote 13). The Union does not appear to take issue with this obvious conclusion.

In short, the only issue properly presented in this case is the substance of the Jury's verdict finding that Respondents acted for the benefit of the Union as a whole rather than merely to support their candidacy in the upcoming union election. This presents a purely factual question which was resolved by the jury and reviewed by the Ninth Circuit. This purely factual issue does not warrant further review in this Court.

B. There Is No Conflict In The Circuits As To The Proper Standard Under *Mt. Healthy* In True Mixed-Motive Cases.

Even if the Union was correct in its belief that this case involves "mixed-motives" within the meaning of *Mt. Healthy*, there is no actual conflict in the Circuits on the application of the *Mt. Healthy* test (Petition, pp. 28-29). No Circuit has held *Mt. Healthy* to be inapplicable to true "mixed-motive" cases under the LMRDA. Rather, the cases cited by the Union

(a) have held (like the Ninth Circuit below) that the evidence did not show that a "mixed-motive" was actually present (*Petramale v. Laborers Local 17*, 736 F.2d 13 (2d Cir. 1984), cert. denied, 469 U.S. 1087 (1984); *Bradford v. Textile Workers Local 1093*, 563 F.2d 1136, 1143 (4th Cir. 1977)), or

(b) did not consider *Mt. Healthy* at all (*Kuebbler v. Cleveland Lithographers & Photoengravers Union Local 24-P*, 473 F.2d 359 (6th Cir. 1973); *Aircraft Mechanics v. Transport Workers Union of America*, 98 F.3d 597 (10th Cir. 1996)), or

(c) adapted the burden of proof allocation of *Mt. Healthy* in contexts not involving "mixed-motives" (*Black v. Ryder/P.I.E. Nationwide*, 970 F.2d 1199 (6th Cir. 1992)).[14]

No Circuit has rejected *Mt. Healthy* in the LMRDA context when the facts demonstrated a true "mixed-motive" case. Absent a conflict in the Circuits, no substantial issue is presented for review in this court as to how *Mt. Healthy* should be applied in cases presenting true "mixed-motives" for union discipline.

C. Because The Jury Rejected The "Mixed-Motive" Defense At Trial Pursuant To An Instruction Offered By The Union Itself, This Court's Consideration Of The Scope Of A "Mixed-Motive" Defense Under The LMRDA Would Be Hypothetical And Could Not Alter The Outcome Below.

Even if a conflict in the Circuits existed, any resolution of the conflict would not affect the outcome in this case.

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[14] *Black v. Ryder*, in particular, was not a "mixed-motive" case. *Black* involved the single issue whether the member had engaged in protected conduct (i.e., handbilling to protest union corruption) or unprotected conduct (i.e., violent intimidation of persons coming to the union hall). *Black* applied *Mt. Healthy* only to the extent that it imposed the burden of proof on the union to show that it was enforcing a reasonable union rule to protect its operations from disruption through unlawful threats of violence.

In this case, the Union itself proposed the language of the *Mt. Healthy* instruction given to the jury over Respondents' objections (RT Vol. XI, pp. 56-58). The jury rejected the defense despite an instruction that Respondents felt was overly-favorable to the Union.[15] Petition, Appendix A, p. 21a and footnote 13.

Whatever this court might decide on the "mixed-motive" issue, the outcome of this case would be the same. If the instruction should not have been given because – as the Ninth Circuit found – the Union's motive was undisputed, not "mixed", the instruction could only have helped the Union by providing it a better defense than the Union was entitled to receive. If the instruction proposed by the Union was properly given and properly stated the elements of a "mixed-motive" case under the LMRDA, the jury nevertheless rejected the defense. Finally, if the instruction misstated the elements of a "mixed-motive" defense more favorably to the Union than *Mt. Healthy* would allow, the jury's verdict in Respondents' favor rendered such error harmless as well.

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[15] As Respondents argued, the actual instruction given (Petition, Appendix F, p. 46a) did not conform to the appropriate "same decision" language in *Mt. Healthy*. Instead, the instruction directed a defense verdict if "there was a reasonable standard for the discipline of plaintiffs under the circumstances of this case" (id., p. 46a, second paragraph). Such language improperly directed a defense verdict merely on the basis that discipline would have been justified, rather than showing it would have been actually imposed. See *McKennon v. Nashville Banner Publishing Co.*, supra, 513 U.S. at 360.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Labor Management Reporting and Disclosure Act, Section 501(a) (29 U.S.C. § 501(a)).

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve and such person of liability for breach of the duties declared by this section shall be void as against public policy.

Labor Management Reporting and Disclosure Act, Section 501(b) (29 U.S.C. § 501(b)).

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated

the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

Labor Management Reporting and Disclosure Act, Section 609 (29 U.S.C. § 529).

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section.